F 2302

San Francisco
Law Library

436 CITY HALL

No. 152581

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

No. 13519

United States Court of Appeals for the Ninth Circuit.

WILLIAM LAFAYETTE ALFORD,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

Appeal from the Supreme Court for the Territory of Hawaii

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-28-52

No. 13519

United States
Court of Appeals
for the Ninth Circuit.

WILLIAM LAFAYETTE ALFORD,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

Appeal from the Supreme Court for the Territory of Hawaii

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-28-52

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

THOMAS P. GILL, ESQ.,
1736 Kalakaua Avenue,
Honolulu, Hawaii,

Attorney for Plaintiff in Error.

T. KITAOKA, ESQ., and
J. H. KAMO, ESQ.,
Assistant Public Prosecutors, City Hall,
Honolulu, Hawaii,

Attorneys for Defendant in Error.

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

January Term 1951

THE TERRITORY OF HAWAII,

vs.

WILLIAM LAFAYETTE ALFORD,
Defendant.

INDICTMENT
(Procuring and Pimping)

First Count

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that William Lafayette Alford, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, between the 1st day of October, 1949, and the 31st day of December, 1949, the exact days and dates being to the Grand Jury unknown, wilfully, unlawfully and feloniously did induce, compel and procure a certain female named Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, to practice prostitution, and to hold herself out as a prostitute, with intent in him, the said William Lafayette Alford, thereby obtain and secure from said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, a portion of the gains earned by her, the said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, in such practice of prostitution and holding herself out as a prostitute, and did then and there and thereby

commit the crime of procuring and pimping contrary to the form of the statute in such case made and provided.

Second Count

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii do further present that William Lafayette Alford, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, between the 3rd day of February, 1950, and the 24th day of February, 1950, the exact days and dates being to the Grand Jury unknown, wilfully, unlawfully and feloniously did induce, compel and procure a certain female named Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, to practice prostitution, and to hold herself out as a prostitute, with intent in him, the said William Lafayette Alford, thereby to obtain and secure from said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, a portion of the gains earned by her, the said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, in such practice of prostitution and holding herself out as a prostitute, and did then and there and thereby commit the crime of procuring and pimping, contrary to the form of the statute in such case made and provided.

Third Count

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii do further present that William Lafayette Alford at the City and County of Honolulu, Territory of Hawaii, and within the

jurisdiction of this Honorable Court, between the 3rd day of March, 1950, and the 25th day of March, 1950, the exact days and dates being to the Grand Jury unknown, wilfully, unlawfully and feloniously did induce, compel and procure a certain female named Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, to practice prostitution, and to hold herself out as a prostitute, with intent in him, the said William Lafayette Alford, thereby to obtain and secure from said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, a portion of the gains earned by her, the said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, in such practice of prostitution and holding herself out as a prostitute, and did then and there and thereby commit the crime of procuring and pimping, contrary to the form of the statute in such case made and provided.

Fourth Count

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii do further present that William Lafayette Alford, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, between the 4th day of April, 1950, and the 10th day of April, 1950, the exact days and dates being to the Grand Jury unknown, wilfully, unlawfully and feloniously did induce, compel and procure a certain female named Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, to practice prostitution, and to hold herself out as a prostitute, with intent in him,

the said William Lafayette Alford, thereby to obtain and secure from said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, a portion of the gains earned by her, the said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, in such practice of prostitution and holding herself out as a prostitute, and did then and there and thereby commit the crime of procuring and pimping, contrary to the form of the statute in such case made and provided.

Fifth Count

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii do further present that William Lafayette Alford, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, between the 11th day of April, 1950, and the 15th day of July, 1950, the exact days and dates being to the Grand Jury unknown, wilfully, unlawfully and feloniously did induce, compel and procure a certain female named Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, to practice prostitution, and to hold herself out as a prostitute, with intent in him, the said William Lafayette Alford, thereby to obtain and secure from said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, a portion of the gains earned by her, the said Edna Rodrigues Alford, also known as Edna Rodrigues Jackson, in such practice of prostitution and holding herself out as a prostitute, and did then and there and thereby commit the crime of procuring

and pimping, contrary to the form of the statute in such case made and provided.

A true bill found this 1st day of March, A.D. 1951.

/s/ HUGH HOWELL, JR.,
Foreman of the Grand Jury.

/s/ JAMES MORITA,
Assistant Public Prosecutor of the City and County of Honolulu.

Certified true copy.

[Endorsed]: Presented and filed March 1, 1951.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii

[Title of Cause.]

Present: Hon. Jon Wiig, Fifth Judge Presiding.

SENTENCE

Mr. Marshall made a statement to the Court, requesting probation for the defendant upon condition that said defendant depart from the Territory of Hawaii within seven (7) days.

The Court sentenced the defendant as follows:

Confinment in Oahu Prison, at hard labor, for a period of five (5) years on each count contained in the indictment. (There are five counts in said indictment.)

The period of confinement on each count was ordered to run concurrently.

Mr. Marshall gave notice of appeal.

The defendant, through his counsel, having given notice of appeal, was not sent to prison, issuance of mittimus in his case being stayed for a period of thirty (30) days.

May 25, 1951.

/s/ ROGER P. WHITMARSH,
Clerk.

In the Supreme Court of the Territory of Hawaii

October Term 1951

No. 2868

TERRITORY OF HAWAII,

vs.

WILLIAM LAFAYETTE ALFORD.

Error To Circuit Court First Circuit
Hon. J. Wiig, Judge

Argued May 22, 28, 1952.
Decided July 2, 1952.

OPINION

Towse, C. J., Le Baron and Stainback, JJ.

Appeal and Error—sufficiency of presentation—validity of statutes.

The validity of a statute cannot be raised for the first time on appeal.

Criminal Law—evidence of other offenses—admissibility.

Evidence of facts showing motive, intent, plan or scheme on the part of defendant is admissible though such facts may show former offenses committed by defendant prior to the period of the statute of limitations.

Witnesses—competency—hunband and wife—for or against each other—criminal prosecutions—common law exception.

At common law one spouse cannot testify for or against the other in a criminal prosecution except in a case of an offense of physical violence committed by one against the person of the other, this exception being based upon the necessity of the occasion. The absence of such an exception would leave the one without protection from the other. (Lord Audley's Case, decided in 1631, 3 How. St. Tr. 401, 414.)

Same—same—same—same—same—same—codified by statute.

Common law rule has been codified by statute in many States and in the Territory of Hawaii.

Same—same—same—same—same—same— common law expounded.

The common law consists of fundamental principles and reasons and the substance of rules as illustrated by the reasons on which they

are based rather than by the mere words in which they are expressed. It is not immutable but flexible and by its own principles adapts itself to varying conditions, and the court at all times in the application of any rule should give heed to present-day standards of wisdom and justice.

Same—same—same—same—same—same— common law applied.

Under the common law as interpreted in the light of modern experience, reason and the furtherance of justice, the exception to the general rule making a wife incompetent to testify against her husband in criminal cases, save when she has suffered a personal injury through his action, permits a wife to testify against her husband in a prosecution for a crime committed by the husband which corrupts the wife's morality, the exception of necessity in the case of assault for injuries to the spouse being equally applicable in protecting a wife against "complete degradation."

Same—same—same—same—same—same— effect of statute removing disqualification.

Where a husband was charged with the offense of compelling and procuring his wife to practice prostitution with intent to obtain a portion of the gains earned by her in such practice, the offense is one "against the person of his wife" under section 9838, Revised Laws of Hawaii 1945, and she is competent to testify

against her husband when he is on trial for such offense.

Opinion of the Court

By Stainback, J.

The defendant was indicted March 1, 1951, on five counts for procuring and pimping, contrary to the provisions of section 11676, Revised Laws of Hawaii 1945, as amended by Act 26 of the Session Laws of Hawaii 1949, the alleged offenses being committed on various dates as therein set out between the 1st day of December, 1949, and the 15th day of July, 1950. Defendant was arraigned in the circuit court of the first judicial circuit on April 13, 1951, where he entered a plea of not guilty; trial was had, jury waived; on April 25, 1951, defendant was found guilty and he was sentenced on May 25, 1951.

The evidence shows that the wife of defendant first met him in March, 1946, and lived with him from July, 1946, prior to her marriage to him in December, 1948; that she was working as a waitress and he was unemployed while living with her; that in August, 1946, the defendant persuaded her to go into the practice of prostitution; that he called her names, threatened her, and told her he had ways of handling a woman like her; that if she didn't do what he said he would "bust my face"; from then on she contined to practice prostitution, turning her earnings over to him. After her marriage to him in December, 1948, she did not cease the practice of prostitution but continued to practice it upon his insistence and he continued to take her earnings.

Detailed evidence was given as to various trips to the outside islands and the remitting of her earning to defendant.

There is ample evidence (consisting mainly of the testimony of the wife of defendant, to which testimony objections were made), to show that defendant was guilty of the offense of pimping and procuring.

Before discussing the objections to the testimony of the wife of defendant, we shall briefly comment on the question raised for the first time on appeal as to the constitutionality of Act 26, Session Laws of Hawaii, 1949, which it is alleged is contrary to section 45 of the Organic Act. As the question was not raised in the court below, and at the first opportunity, it cannot be raised for the first time in this court. (Territory v. Kelley, 38 Haw. 433; Territory v. Tsutsui, 39 Haw. 287.)

Objections to the testimony of defendant's wife may be summarized as follows: (1) that the offense of procuring and compelling a wife to practice prostitution was not an offense against the person of the wife and therefore she was not competent to testify against defendant at a trial for such offense; (2) that evidence relating to other offenses, in particular those committed prior to the statute of limitations, was inadmissible and, if admissible, that the witness, who was the wife of defendant, was not competent to testify thereto for reasons set forth under (1) above; and, (3) if procuring the wife to practice prostitution were an offense against the wife and if she were competent to testify rela-

tive thereto, yet as to offenses committed prior to coverture the wife was not competent to testify under section 9838, Revised Laws of Hawaii 1945.

That evidence of facts showing motive, intent, plan and scheme on the part of defendant (even though it tends to show former offenses of the defendant) may be given is too well settled to need extended discussion. "It is not error to admit evidence of facts showing motive, or which are part of the transaction, or exhibit a train of circumstantial evidence of guilt, although such facts showed former offenses of the defendants." (Ter. of Haw. v. Watanabe Masagi, 16 Haw. 196.) See also: Ter. v. Chong Pang Yet, 27 Haw. 693; Ter. v. Awana, 28 Haw. 546; Ter. v. Oneha, 29 Haw. 150; Territory v. Abellana, 38 Haw. 532; Wharton's Criminal Evidence, 11th Ed., Vol. 1, §352, p. 527; Underhill's Criminal Evidence, 4th Ed., §187, p. 346: "Unrelated crimes which were barred by the statute of limitations may be introduced to show general plan * * *."

"While ordinarily evidence is not admissible of a crime distinct from that for which the defendant is being tried, the fact of such crime, and defendant's connection with it, may be proved whenever it tends to show guilty knowledge, design, plan, motive or intent, if these matters are in issue in the case on trial. * * * the evidence referred to would have been admissible if the first four counts had never been drawn. Upon this point it is well said by the Superior Court (88 Pa. Superior Ct. 216, 223): 'This evidence, documentary and oral,

was admissible under the well-settled rule that evidence of similar and unconnected offenses may be offered to show guilty knowledge, design, plan, motive and intent when such is in issue, and this is true although the other offenses are beyond the statutory period: [Citing authorities.] Here the evidence tended to show that the offenses charged were part of a system * * *'." (Commonwealth v. Bell, 288 Pa. 29, 135 Atl. 645.)

It was therefore not error to admit evidence showing that beyond the statute of limitations the defendant forced the complaining witness for the prosecution by threats and intimidation into the practice of prostitution and exacted from her the proceeds of such practice. Obviously, this showed his scheme and design and, with her other testimony, also showed that it was a continuing offense up to the dates alleged in the indictment.

As to whether the wife herself may give evidence of such offenses committed prior to coverture will be discussed hereinafter with the discussion as to what extent the wife is a competent witness against her husband for compelling or persuading her to engage in prostitution.

It is contended that where a husband is charged with the offense of compelling and procuring his wife to practice prostitution with the intent to obtain and secure from her a portion of the gains earned in such practice of prostitution, the "offense" is not one "against the person of his wife" and therefore under section 9838, Revised Laws of Hawaii 1945, she is not competent to tes-

tify against her husband when he is on trial for such offense.

At common law one spouse cannot testify for or against the other in a criminal prosecution except that one may testify against the other as to an offense of violence committed by the latter "against the person" of the former, this exception being based upon the necessity of the situation, for the absence of such an exception would leave the one without protection from the other. (Lord Audley's Case, decided in 1631, 3 How. St. Tr. 401, 414.)

This exception has been codified by statute in some States and the States have removed the disqualification of a defendant testifying in his own behalf in criminal cases; they have also either by statute or judicial decision permitted the wife or the husband to testify in a criminal proceeding in behalf of the other.

It would appear that Hawaii has followed this procedure, as Laws of 1876, chapter XXXII, section 53, contained the following provision: "Section 53. Nothing herein contained * * * shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, or any wife competent or compellable to give evidence against her husband, except in such cases where such evidence may now be given; provided also that in all criminal proceedings the husband or wife of the party accused shall be a competent witness for the defense." The Session Laws of 1927 inserted after the clause "except in such cases where such evidence may now be given" the fol-

lowing: "and in such cases in which the accused is charged with the commission of an offense against the person of his wife or of her husband, as the case may be."

Is compelling or persuading of a wife by the husband to become a prostitute an "offense against the person of his wife"? Counsel for defendant strongly urges that our statute is a codification of the common law and must be strictly construed; that the offense "against the person of his wife" must be a crime of violence involving bodily injury to the person; that such was the common law authorities and weight of the authority in the States under various statutes.

Assuming that the Hawaiian statute is a codification of the common law, let us therefore examine what the common-law rule was and is as interpreted by enlightened modern authorities in regard to testimony of a wife against her husband for an "offense against" her "person."

As the question of the qualifications of the spouses as witnesses against each other in criminal prosecutions is controlled by legislative enactment in most of the States, the modern growth and development of the common-law rule regarding the testimony of one spouse against the other is primarily to be found in the decisions of the federal courts. In this connection it has often been said that the common law is not immutable but flexible and by its own principles adapts itself to varying conditions. The court in Funk v. United States, 290 U.S. 371, in deciding that a wife was a compe-

tent witness in behalf of her husband in a criminal case, even though there be no statutory modification of the common-law rule, said in substance that courts in the face of changing conditions are not chained to ancient formulae but may enforce conditions deemed to have been wrought in the common law itself by force of changing conditions; that the public policy of one generation may not under changed conditions be the public policy of another; that the dead hand of a common-law rule of evidence of 1789 should no longer be applied where contrary to modern experience and thought and to the general current of the legislative and judicial opinion; that the court at all times in the application of any rule of evidence should give heed to present-day standards of wisdom and justice.

Our own court in Dole v. Gear, 14 Haw. 554, in refusing to follow an old English rule and the decisions of Massachusetts, where the English rule was regarded as the correct one and whose statute Hawaii adopted, recognized that the common law consists of principles and not of set rules; on page 561 of the decision it quotes with approval from Morgan v. King, 30 Barb. 9: "* * * 'when it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules, or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the unwritten law of England; and we have adopted it as a constantly improving science, rather than as an art; as a system of legal logic, rather than as a code of

rules. In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed.' "

In United States v. Williams, 55 F. Supp. 375, at page 380, the statement was made that: " '* * * rules of evidence for criminal trials in the federal courts are made a part of living law and not treated as a mere collection of wooden rules in a game.' "

Following this emancipating interpretation of the common law, as set forth in Funk v. United States, supra, the federal courts have uniformly ruled that under the common law as interpreted in the light of modern experience, reason, and in the furtherance of justice, the exception to the general rule making a wife incompetent to testify against her husband in criminal cases, save when she has suffered a personal injury through his action, permits the wife to testify against her husband in a prosecution for a crime instituted by the husband which corrupts the wife's morality.

In United States v. Rispoli, 189 Fed. 271 (1911), permitting the wife to testify against her husband in a Mann Act case, it was stated: "* * * the offense in question was essentially within the spirit of the long-established rule that allows her to testify in protection or in vindication of her right to be secure in her person against threat or assault, even by her husband."

The federal decisions relating to Mann Act cases

are filled with similar statements. For example, in United States v. Mitchell, 137 F. (2d) 1006, it was said: "After all, the situation of the injured wife deserves some consideration; and in circumstances such as are here presented (violation of the Mann Act), we think it would be shocking to deny her the right to testify. With Denning v. United States, supra, 247 F. at page 466, we believe that 'a woman is as much entitled to protection against complete degradation as against a simple assault.' "

Shores v. United States, 174 F. (2d) 838, decided in 1949, stated in the syllabus: "Defendant's transportation of wife in interstate commerce contrary to the Mann Act was a personal wrong against the wife whose testimony was properly admitted in evidence * * *." (Emphasis added.)

Cohen v. United States, 214 Fed. 23, in another white slave case, held that the bringing of the wife from one State to another in violation of the White Slave Act was "such a personal injury to her as to entitle her to testify against him." (Emphasis added.)

In accord are the following cases: Pappas v. United States, 241 Fed. 665; Denning v. United States, 247 Fed. 463; United States v. Mitchell, 137 F. (2d) 1006 (aff'd on rehearing, 138 F. [2d] 831; cert. denied, 321 U.S. 794; rehearing denied, 322 U.S. 768); Levine v. United States, 163 F. (2d) 992; Hayes v. United States, 168 F. (2d) 996; Shores vs. United States, 174 F. (2d) 838; United States v. Bozeman, 236 Fed. 432; United States v. Williams, 55 F. Supp. 375.

The Williams case, supra, contains a very excellent discussion of the authorities and the reasons behind those decisions. It held in portions of the syllabus as follows: "Under the common law as interpreted in light of modern experience, reason, and in furtherance of justice, exception to rule generally making a wife incompetent to testify against husband without his consent save when she has suffered personal injuries through his actions has been expanded to permit wife to testify against husband in prosecution for crime which corrupts wife's morality." This case points out that the old common-law rule that a wife generally could not testify against her husband was and is sustained upon the ground that the contrary rule would disturb the marital happiness of the couple, but an exception to this rule was made and the wife was permitted to testify against her husband when she suffered personal injury. This exception was based upon the necessity of the situation. It discusses the 1916 case of Johnson v. United States, 221 Fed. 250, which held that the wife could not testify against her husband in a Mann Act case; that the rule existing in 1789, which at common law prevented a wife from testifying against her husband unless she had suffered personal violence at his hand, could be changed only by statute; it then points out and discusses the Funk v. United States case, supra, which overrules the Johnson case, and held that the federal courts are not bound by the common-law rules which governed the wife's competency and privilege to testify in 1789 or any other

year. It discusses several of the cases relied on by defendant where the wife cannot testify in crimes such as bigamy, adultery and fraud on the part of the husband, pointing out that though such cases may be a moral wrong to the wife, certainly they involve no injury to her morals; that Mann Act violations do involve injuries to the wife's morals. It continues: "Consequently, cases coming down to us from the old common law rule of 1789, and still followed by some courts today, really pertain only to crimes of personal violence by the husband against his wife and not to crimes like the instant one which result in moral violence to the wife. So it seems fallacious to suggest that a wife cannot testify against her husband—even if he has injured her morals—merely because the common law provided for a wife's testifying against her husband only when he had used violence upon her person. The common law seems never to have had occasion to consider the question of exceptions to the general rule further than the personal injury situation.

"No one can doubt that the common-law exception invoked when the husband uses personal violence against his wife is sound. Moreover, it is securely rooted in the foundations of modern justice, and no reason to unearth it has been suggested. As some courts which have considered the question of moral injury have pointed out, the acts like those which this defendant has committed are the same, in practical thinking, as an act of personal violence against the wife. [Citing authorities.] It is undoubtedly an offense against the wife, and it

operates directly and immediately upon her." (Emphasis added.)

We agree with this statement that such act is "undoubtedly an offense against the wife, and it operates directly and immediately upon her." It is no strained construction to hold that putting one's wife into prostitution is "an offense against the person of his wife."

Finally, as to the contention that the wife was not a competent witness to testify that in August, 1946, and prior to the marriage, the defendant forced her to go into the practice of prostitution by threats, etc., is thoroughly discussed in United States v. Williams, supra, as well as in the case of United States v. Shores, supra. Pointing out that to permit the wife to testify against her husband as to injuries to her morals during coverture but not as to such injuries occurring before coverture, the court would arrive at a very anomalous position; if defendant were married to the woman at the time of the offense she could testify against him, and if defendant and the woman were not married at the time of the offense and at the time of the trial she could testify against him, but if the woman were not married to him at the time of the offense but was at the time of the trial she could not testify against him. The cases holding to this anomalous rule go on the theory that some sort of forgiveness of the wrong to the wife may be assumed by the marriage; if the injured person desires to forget the matter and to live in a happy marital state with the one who injured her, there

is an aversion to requiring or permitting her to testify against her husband whom she has forgiven. This is readily understandable. The court further points out that when personal violence is used upon a woman she is the only one injured; society may be injured very rarely if at all, but such is not the case with injuries against the wife involving moral degradation.

The Mann Act, as has frequently been stated, was to protect "weak women from bad men" and that the purpose of the Congress would be thwarted if the woman's lips were sealed against a vicious and degraded man just because he may have induced the "weak woman" to marry him. "It seems sound, therefore, to conclude that, under the common law interpreted in light of modern experience, reason, and in the furtherance of justice, a woman may testify against her husband when he has transported her in interstate commerce for the purposes of prostitution in violation of the Mann Act, and this rule of evidence should apply whether the transportation occurred during or prior to coverture." (United States v. Williams, 55 F. Supp. 375, at page 380.)

Obviously, the purpose of our statute relating to procuring and pimping is, as is the Mann Act, to protect "weak women from bad men." The same reasoning applies to it as applies to the Mann Act and the purpose would better be served by permitting the woman to testify as to the acts forcing her into the practice of prostitution prior to marriage, particularly as the husband forced her con-

tinuance in such practice, and the subsequent marriage was apparently for the very purpose of attempting to obtain protection for the vicious man.

In conclusion therefore we hold that the famous exception for Necessity in case of injury to the spouse, as set forth in Lord Audley's Case, is equally applicable in securing the wife in her person and in protecting her against complete degradation as against a simple assault; that as stated by some of the decisions allowing a wife to testify against her husband who forced her into prostitution, it is within the spirit of the long-established rule of necessity to protect her against assault by her husband. (* * * "the letter killeth, but the spirit giveth life.") Further, permitting testimony of a wife under such circumstances comes not only within the exception of Necessity set forth in Lord Audley's Case but actually comes within the wording of the territorial statute as "an offense against the person of his wife." It is difficult to conceive a more heinous offense against her person by a husband.

Though the decisions holding that the wife is competent to testify as to such offenses committed prior to coverture are more logical and reasonable than the ones to the contrary, it is not necessary to pass directly on this point as the evidence adduced showing offenses prior to coverture was not to charge the defendant with offenses at that time, which in fact would have been barred by the statute of limitations, but was evidence of the defendant's plan for putting this woman into prostitution and

that it also showed other crimes was merely incidental.

Judgment affirmed.

/s/ EDWARD A. TOWSE,

/s/ LOUIS LE BARON,

/s/ INGRAM M. STAINBACK.

Certified true copy.

[Title of Supreme Court and Cause.]

JUDGMENT ON WRIT OF ERROR

Pursuant to the opinion of the supreme court of the Territory of Hawaii, rendered and filed on July 2, 1952, the judgment of the lower court is affirmed.

Dated: Honolulu, Hawaii, July 11, 1952.

By the Court:

/s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ INGRAM M. STAINBACK,
Associate Justice.

Certified true copy.

[Endorsed]: Filed July 11, 1952.

[Title of Supreme Court and Cause.]

APPEARANCE OF COUNSEL

Comes now, Thomas P. Gill, attorney at law, and hereby enters his appearance as counsel for William Lafayette Alford, defendant-plaintiff in error in the above-entitled cause.

Dated: At Honolulu, T. H., this 18th day of July, 1952.

/s/ THOMAS P. GILL.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

NOTICE OF APPEAL

1. Appellant: William Lafayette Alford, also known as Willie Alford, of 2334 North King Street, Honolulu, Territory of Hawaii.

2. Appellant's attorney: Thomas P. Gill, of 1736 Kalakaua Avenue, Honolulu, Territory of Hawaii.

3. Offense: Procuring.

4. On trial without jury, appellant was convicted in Circuit Court of the First Judicial Circuit and sentenced to five years imprisonment, which judgment was affirmed by the Supreme Court of the Territory of Hawaii in an opinion rendered on July 2, 1952, and a judgment entered on July 11, 1952.

5. The appellant is presently free on bail.

6. I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-entitled judgment.

Dated: At Honolulu, T.H., this 18th day of July, 1952.

WILLIAM LAFAYETTE ALFORD,

By /s/ THOMAS P. GILL,
His Attorney.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

PETITION FOR APPEAL

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the Territory of Hawaii:

Comes now William Lafayette Alford, Defendant and Plaintiff in Error herein, and deeming himself aggrieved by the judgment of the Supreme Court of the Territory of Hawaii made and entered on the 11th day of July, 1952, pursuant to the opinion and decision of said Court made and entered on the 2nd day of July, 1952, prays that an appeal may be allowed from said judgment to the United States Court of Appeals for the Ninth Circuit; that an order be made fixing the amount of a costs bond;

that a duly authenticated transcript of the record and proceedings upon which said decision and judgment were made be sent to the United States Court of Appeals for the Ninth Circuit; that a citation issue as provided by law.

Dated: At Honolulu, T.H., this 18th day of July, 1952.

WILLIAM LAFAYETTE ALFORD,
Defendant and Plaintiff in Error.

By /s/ THOMAS P. GILL,
His Attorney.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

AFFIDAVIT IN SUPPORT OF JURISDICTIONAL AVERMENT

Territory of Hawaii,
City and County of Honolulu—ss.

Thomas P. Gill, being first duly sworn on oath, deposes and says:

That he is the counsel of record for William Lafayette Alford, Plaintiff in Error in the above-entitled cause;

That a Federal constitutional question is involved herein in that Plaintiff-in-Error has been denied

the due process guaranteed to him by the Fifth Amendment to the Constitution of the United States in that he was convicted on a crime not charged in the Indictment and without epidence that he had committed the crime charged in the Indictment;

That from the entire record herein and particularly the decision of the Supreme Court of the Territory of Hawaii on the writ of error, it appears that the Supreme Court of the Territory of Hawaii committed manifest error as set forth in the Assignment of Errors on file herein.

This completes affiant's statement.

/s/ THOMAS P. GILL.

Subscribed and sworn to before me this 21st day of July, 1952.

[Seal] /s/ J. DONOVAN FLINT,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission Expires June 30, 1953.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now William Lafayette Alford, Defendant-Plaintiff in Error above named, by his attorney,

Thomas P. Gill, and files the following assignment of errors upon which he will rely in the prosecution of his appeal in the above-entitled matter from the judgment entered herein on July 11, 1952, dismissing his writ of error and affirming the judgment of the trial court:

Assignment No. I.

The Supreme Court of the Territory of Hawaii erred in upholding the conviction of appellant on the ground there was evidence to sustain an essential element of the charge, namely, that plaintiff in error did induce, compel, and procure a certain female named Edna Rodrigues Alford to practice prostitution during the various times set forth in the indictment, and thus plaintiff in error was deprived of due process of law in that he was convicted of a charge on which no evidence was submitted.

Assignment No. II.

The Supreme Court of the Territory of Hawaii erred in upholding the conviction of appellant on the ground that there was evidence to sustain an essential element of the charge, namely, that plaintiff in error did induce, compel, and procure a certain female named Edna Rodrigues Alford to practice prostitution during the various times set forth in the indictment, and that plaintiff in error was thereby denied due process of law in that evidence was received and he was convicted on a charge not made, namely, that he received money without consideration from the earnings of a woman engaged in prostitution.

Assignment No. III.

The Supreme Court of the Territory of Hawaii erred in upholding the conviction of appellant on the ground that there was evidence to sustain an essential element of the charge, namely, that plaintiff in error did induce, compel, and procure a certain female named Edna Rodrigues Alford to practice prostitution during the various times set forth in the indictment, when the only testimony of such inducement, compelling, and procurement related to periods prior to the marriage between plaintiff in error and the complaining witness and were further of such date as to be barred by the Territorial statute of limitations.

Assignment No. IV.

The Supreme Court of the Territory of Hawaii erred in upholding the conviction of appellant on the ground that there was evidence to sustain an essential element of the charge, namely, that plaintiff in error did induce, compel, and procure a certain female named Edna Rodrigues Alford to practice prostitution during the various times set forth in the indictment, when the only pertinent evidence submitted in the case was the testimony of the wife of the defendant who was not a competent witness under the laws of the Territory.

Wherefore, Plaintiff in Error prays that judgment and decision of this cause be reversed and the cause remanded with instructions to discharge the defendant.

Dated: At Honolulu, T. H. this 18th day of July, 1952.

WILLIAM LAFAYETTE ALFORD,
Defendant and Plaintiff in Error.

By /s/ THOMAS P. GILL,
His Attorney.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

COST BOND

Know All Men by These Presents:

That William Lafayette Alford, as principal, and Pacific Insurance Company, Ltd., as sureties, are held and firmly bound unto the Territory of Hawaii in the just and full sum of Two Hundred Fifty Dollars ($250.00), legal currency of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

The condition of this obligation is such that:

Whereas, the above-bounden principal, William Lafayette Alford, has filed his petition for appeal from the Supreme Court of the Territory of Hawaii to the United States Court of Appeals for the Ninth Circuit from the judgment of said Supreme Court entered on the 11th day of July, 1952, and

the decision rendered on the 2nd day of July, 1952.

Now, therefore, if said principal shall prosecute his appeal with effect and answer for all costs, if he fails to sustain said appeal, then this obligation shall be void, otherwise it remains in full force and effect.

Sealed with our seal and dated at Honolulu, Hawaii, this 21st day of July, 1952.

/s/ WILLIAM LAFAYETTE ALFORD,
Principal.

PACIFIC INSURANCE CO., LTD.,

By /s/ CALVERT G. CHIPCHASE,
Surety.

[Stamped]:

/s/ EDWARD A. TOWSE,
Chief Justice Supreme Court of the Territory of Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 21st day of July, in the year one thousand nine hundred and fifty-two, before me personally appeared Calvert G. Chipchase to me personally known, who being by me duly sworn, did say that he is the Attorney-in-Fact of Pacific Insurance Company, Limited, duly appointed under Power-of-Attorney dated the 27th day of May, A.D. 1952, which Power-of-Attorney is now in full force and

effect, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation, and said Calvert G. Chipchase acknowledged said instrument to be the free act and deed of said corporation.

/s/ MARY ZUIS,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission Expires May 31, 1955.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the petition filed herein by Defendant-Plaintiff in Error above named for allowance of an appeal and it appearing that Notice of Appeal, together with a good and sufficient bond in the sum of $250.00 has been filed,

It Is Hereby Ordered that the appeal in the above-entitled cause be and the same is hereby allowed; and

It Is Further Ordered, that all further proceedings in this Court be, and they are hereby, stayed pending the disposition of this appeal.

Dated: At Honolulu, T. H., this 21st day of July, 1952.

[Seal] /s/ EDWARD A. TOWSE,
Chief Justice Supreme Court of the Territory of Hawaii.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

CITATION

The Territory of Hawaii,

To Defendant in Error above named, and to Alan R. Hawkins, Esq., Public Prosecutor of the City and County of Honolulu, Territory of Hawaii, its Attorney:

You Are Hereby Cited to Appear in the United States Court of Appeals for the Ninth Circuit in the above-entitled matter within forty (40) days from the date hereof.

Dated: At Honolulu, T. H. this 21st day of July, 1952.

[Seal] /s/ EDWARD A. TOWSE,
Chief Justice Supreme Court of the Territory of Hawaii.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above-Entitled Court:

You will please prepare transcript of record of this cause to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings and papers on file, to wit:

1. Indictment.

2. Instructions as given by the Court.

3. The verdict.

4. The transcript of the evidence at the trial.

5. Opinion and decision of the Supreme Court of the Territory of Hawaii.

6. Judgement of the Supreme Court of the Territory of Hawaii.

7. Notice of Appeal.

8. Petition for Appeal.

9. Affidavit in support of jurisdictional averment.

10. Assignment of errors.

11. Cost bond.

12. Order allowing appeal.

13. Citation.

14. Praecipe for transcript of record.

15. Statement of points relied upon and designation of record.

Dated: At Honolulu, T. H., this 18th day of July, 1952.

WILLIAM LAFAYETTE ALFORD,
Defendant and Plaintiff in Error,

By /s/ THOMAS P. GILL,
His Attorney.

Certified true copy.

[Endorsed]: Filed July 21, 1952.

[Title of Supreme Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Receipt from Thomas P. Gill, attorney for Defendant-Plaintiff in Error above named, of the following filed in the Supreme Court of the Territory of Hawaii in the above-entitled cause is hereby acknowledged:

1. Notice of Appeal.
2. Petition for Appeal.
3. Affidavit in support of jurisdictional averment.
4. Assignment of Errors.
5. Cost Bond.
6. Order Allowing Appeal.
7. Citation.

8. Praecipe for Transcript of Record.

Dated: At Honolulu, T. H., this 22nd day of July, 1952.

TERRITORY OF HAWAII,
Defendant-in-Error.

By /s/ ROBERT E. ST. SURE,
Ass't Public Prosecutor of the City and County of Honolulu, Territory of Hawaii.

Certified true copy.

[Endorsed]: Filed July 24, 1952.

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

Cr. No. 23057

TERRITORY OF HAWAII,

vs.

WILLIAM LAFAYETTE ALFORD,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

JAMES KAMO, ESQ., and
T. KITAOKA, ESQ.,
Assistant Public Prosecutors for the Territory;

DAVID H. MARSHALL, Esq.,
Counsel for the Defendant.

Wednesday, April 25, 1951

Present: Honorable Jon Wiig, Fifth Judge, Presiding.

JAMES KAMO, ESQ., and
T. KITAOKA, ESQ.,
Assistant Public Prosecutors,
for the Territory;

DAVID H. MARSHALL, ESQ.,
Counsel for Defendant;

DEFENDANT, in person.

(The Clerk called the case.)

Mr. Kamo: Ready for the Territory.

Mr. Marshall: Ready for the defendant.

The Court: It is my understanding, Mr. Marshall, that the defendant is waiving his right to a jury trial in this case?

Mr. Marshall: That's right, your Honor.

The Court: You may proceed.

Mr. Kamo: In this case, your Honor, William Lafayette Alford is being charged on five separate counts for procuring. He has been charged under that section of the statute under which it is alleged he has received the proceeds from a prostitute without any consideration. The Government's witness in this case is Mrs. William Lafayette Alford. May I have Mrs. Alford?

MRS. EDNA RODRIGUES ALFORD

called as a witness for and on behalf of the Territory, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kamo:

Q. Will you state your full name, please? [3*]

A. Mrs. Edna R. Alford.

Q. You are also known as Edna Rodrigues Alford? A. Yes.

Q. Where do you live now?

Mr. Marshall: May it please the Court, at this time I object to any testimony being given by this witness against this defendant. I would like permission of the Court to argue the matter.

The Court: Very well.

Mr. Marshall: I will enter into a stipulation on behalf of the defendant that these parties are at the present time legally married.

Mr. Kamo: We so stipulate. May I have Mrs. Alford off the stand for a while?

Mr. Marshall: Surely.

(Whereupon the witness, Mrs. Edna Rodrigues Alford, left the witness stand.)

(Argument by both counsel.)

The Court: The Court will take a short recess to check the authorities.

(Recess.)

The Court: On checking the statute, the one under consideration, in the case in 10 Hawaii, I

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

find that the statute as amended in 1927 added the words now appearing in the statute, "and in such cases in which the accused is charged with the commission of an offense against the person of his wife," so that anything that was said in 10 Hawaii I think was affected by that amendment when the statute was brought up to date, so to speak, so as to permit [4] the wife to testify in cases where there had been an offense against her person. I do not know whether this is an enlightened view, or the proper view, but it is the view this Court is going to take. Where the defendant is charged with procuring and pimping under our statute I feel it is an offense against the person of the wife, and feel she is competent to testify against the husband where he is on trial for that offense, and will permit Mrs. Alford to testify.

Mr. Marshall: May we have an exception.

The Court: Yes, Mr. Marshall.

Mr. Marshall: May it please the Court, at this time I respectfully ask for a continuance in the trial of the case in chief. My reason for that is, I was informed and had reason to believe that Mrs. Alford would decline to be a witness for the Government. I was informed since coming to Court this morning that Mr. Alford apparently now believed she is not going to avail herself of her absolute right to refuse to testify. He now tells me that he has some papers at home which he secured from George Mills, which will have considerable bearing on the case. I would also like an opportunity, in view of what he has told me this morning, to sub-

poena Mr. Mills. I would like a day or two, whatever the Court would allow me, to do some spade work on this.

The Court: Those are matters which you will need in defense, or matters you will need to examine before you could properly cross-examine witnesses for the Governmnt?

Mr. Marshall: That is exactly right. It relates more to cross-examination than anything else. I would be glad at this time to make an offer of proof to the Court so [5] the Court will know what I have in mind.

The Court: I would like to know what you have in mind.

Mr. Marshall: The charge here is that the defendant coerced his wife into acts of prostitution, and that he received certain money that she was able to make in this fashion. I understand from what the defendant tells me this morning, we are in a position to prove that Mrs. Alford engaged in prostitution in Hilo during 1950 while he was on the Island of Oahu; that she had an associate over there, had an association with an individual known as Mr. Mills, and that she was, I believe, arrested and convicted and sentenced over there for the offense. I think that will have considerable bearing on whether or not this woman is just a common prostitute because she wants to be a prostitute, or whether she was coerced into becoming a prostitute by her husband. In other words, her prostitution isn't binding on this man unless he forced her to become a prostitute and lived on her earnings.

The Court: That was the position taken by other counsel in other cases, and I am not too sure it is right, Mr. Marshall. I may be wrong in my construction of the statute. My idea is that the offense consists of inducing, compelling or procuring a person to act as a prostitute, to practise prostitution, and thereby to obtain and secure from her a portion of the gains earned by her during the times alleged in the indictment. I do not feel that under this statute the defendant has to beat up a person in order to make her practise prostitution, or to exercise or to compel [6] by force, or the use of drugs, or some such thing. I may be wrong, but it is my understanding of the statute that it is the inducing, compelling and procuring, or any of them, whereby the procurer or the pimp obtains a portion of the ill-gotten proceeds. I may be wrong on that.

Mr. Marshall: No, your Honor, I agree, but this man is no Svengali. He is unable to stay on Oahu and induce this woman to perform certain acts on the Island of Hawaii. I think the very fact that she was over there apparently on her own violition practising prostitution would be some evidence that it was her own free act and deed rather than anything induced by this man in the hopes of gaining any of the proceeds. I feel it would be very prejudicial to the defendant's case. I regret the position I am in not having this information until this morning, although I have had repeated conferences with the defendant. I would like a short period to be better prepared on this particular point.

The Court: What do you have to say on that, Mr. Kamo?

Mr. Kamo: As I have made a brief statement earlier I had singled out those portions of the statute which the Court has reiterated. We are not charging Mr. Alford with forcibly driving Mrs. Alford into prostitution, but under that portion of the section which is separated by a semicolon, he has received the proceeds from Mrs. Alford, a portion of the earnings which she made practising prostitution. I do not think the material factor in this case is his forcing her into prostitution for the first time, we are not saying she wasn't one and she became one for the first time, merely [7] the fact on these five counts, ranging from October, 1949, to August, 1950, that he had received proceeds from Mrs. Alford knowing she got this from prostitution. I would like to proceed with my case in chief. If the material that Mr. Marshall is going to get has anything to do with my case, he has just indicated he needed it for cross-examination of Mrs. Alford, I would be willing to put Mrs. Alford back on the stand again at that time, and have Mr. Marshall cross-examine further, if he so desires. I have some other witnesses outside, from the Hawaiian Airlines and the Police Department, who would like to testify now. We have subpoenaed them to be here this morning, and they are here. If their testimony can come in now, and if Mrs. Alford's examination in chief can come in now, and reserve the cross-examining part of it, I have no objection. I would like to proceed, if possible, with the case now.

The Court: Is the testimony of the other wit-

nesses more or less formal testimony, that is the witness from the Hawaiian Airlines?

Mr. Kamo: Yes, and Bonifacio Bongalon. He is an inmate of Oahu Prison. We would like to have him make one statement, as to one portion of the testimony which corroborates Mrs. Alford's testimony. It is a matter of corroboration.

The Court (To Mr. Alford): Where do you live, Alford?

Mr. Alford: Your Honor, I live at Kamohoalii Road, Kalihi Tract.

The Court: You have those documents up [8] there?

Mr. Alford: I have them at my house, yes.

The Court: Why didn't you show them to your attorney before?

Mr. Alford: I didn't think, your Honor, Judge, I didn't think it was necessary to pick them up and bring them down.

The Court: Do you think, Mr. Marshall, you would have time, if we continued this matter until 1:30 this afternoon, to get this information and proceed? I would rather have an orderly presentation in the way the Prosecutor planned his case rather than piecemeal.

Mr. Marshall: We will be ready to go on at 1:30, your Honor.

The Court: Very well, this case will be continued until 1:30 this afternoon.

(10:15 a.m. Court recessed until 1:30 p.m.)

Wednesday, April 25, 1951, 1:30 P.M.

(All parties being present as before, the following further proceedings were had and testimony adduced:)

The Court: Have you had time, Mr. Marshall, to make the investigation you desired?

Mr. Marshall: Yes, your Honor.

The Court: Are you ready to proceed?

Mr. Kamo: Yes, your Honor. [9]

Mr. Marshall: At this time I ask permission of the Court to ask the complaining witness a few preliminary questions. I would like to be satisfied that the evidence from her is voluntary.

The Court: Any objection, Mr. Kamo?

Mr. Kamo: Yes, your Honor. In a sense I believe Mr. Marshall is trying to say she should be warned of her constitutional rights, and she need not testify to anything that might tend to incriminate her.

Mr. Marshall: No. I may lead to that. It is not the main purpose.

Mr. Kamo: If it is something to do with that, that is for the witness herself to decide whether she wishes or does not wish to testify. The Court can advise her as to that. If Mr. Marshall is going to treat her as his witness and claim her right——

Mr. Marshall: That is not the purpose of this examination.

The Court: What is the purpose?

Mr. Marshall: If we had a situation here of say a confession that was made under duress, or under

fear, it would be inadmissible. I have information that leads me to believe that Mrs. Alford is testifying against her husband, Willie Alford, due to duress and threats made by certain members of the Honolulu Police Department.

Mr. Kamo: That is not true. I definitely object on two grounds, one that that factor could be brought out on cross-examination. It is a direct accusation on the [10] Office of the Public Prosecutor that we are using this method of getting the witness to testify, which I assure you is not the case.

The Court: We will stop right here, and I will warn the witness as to her constitutional rights, then any matters which Mr. Marshall wishes to bring out on cross-examination he may bring it out at that time. (To Mrs. Alford): Mrs. Alford, you are aware of the fact that you do not have to give any testimony that might tend to incriminate you?

Mrs. Alford: Yes, sir.

The Court (To Mrs. Alford): You know what that means?

Mrs. Alford: Yes, sir.

The Court (To Mrs. Alford): You do not have to give any testimony which might degrade you, that is a privilege only you can claim, you understand that?

Mrs. Alford: Yes, sir.

The Court (To Mrs. Alford): Do you know why you are here today?

Mrs. Alford: Yes.

The Court (To Mrs. Alford): That is to testify.

Mrs. Alford: To testify.

The Court (To Mrs. Alford): You have thought the matter over, and are willing to testify?

Mrs. Alford: Yes, your Honor.

The Court: Very well, you may proceed.

MRS. EDNA RODRIGUES ALFORD

resumed the witness stand, having been heretofore duly sworn, and testified further as follows:

Direct Examination

By Mr. Kamo:

Q. You are Mrs. William Lafayette Alford, is that right? A. Yes, sir.

Q. You are also known as Edna Rodrigues Alford? A. Yes, sir.

Q. Mrs. Alford, do you know of one by the name of William Lafayette Alford? A. Yes.

Q. Mr. Alford is sitting in this courtroom?

A. Yes.

Q. Point him out to us.

A. (Witness indicates the defendant, William Lafayette Alford.)

Q. Indicating the gentleman sitting to the right of Mr. Marshall, the defendant in this case?

A. Yes.

Q. You are the wife of Mr. Alford?

A. Yes.

Q. The defendant in this case?

A. Yes, sir, that's right.

Q. How long have you been married to William Lafayette Alford, Mrs. Alford?

A. I have been married to Willie Alford since December 23, 1948, up to '49.

(Testimony of Edna Rodrigues Alford.)

Q. How long before that had you known Mr. Alford? [12]

A. I have known Alford since 1946.

Q. Do you know about what month it was that you first met Mr. Alford?

A. Yes, it was March.

Q. March of 1946? A. That's right.

Q. At that time where were you employed?

A. I was employed at the Combat Cafe on Hotel Street. The address there I don't know.

Q. As a waitress? A. As a waitress.

Q. Where was Mr. Alford working?

A. He was working opposite the place I was working, Club 121.

Q. What was he doing there?

A. He was a soda jerk.

Q. How did you happen to meet Mr. Alford?

A. By him coming in every morning, or in the morning, and have dinner there and breakfast, and we got acquainted through a friend of mine, right there, through a friend who worked where I was working.

Q. After you met Mr. Alford and up to the time, December 23, 1948, when you got married, were you very good friends with him, or just casual friends?

A. We were already good friends.

Q. Good friends? A. Yes, sir.

Q. Did you live with Willie Alford before you were married to him? A. Yes, sir. [13]

Q. When was this that you started to live with Mr. Alford? A. '46 to '47.

(Testimony of Edna Rodrigues Alford.)

Q. '46? A. Yes.

Q. About what month was it?

A. After I was working at the Combat Cafe.

Q. Then after you started staying with Mr. Alford did you continue to work as a waitress at the Combat Cafe? A. No.

Q. You had already quit working there?

A. Yes.

Q. When you had quit your work was Mr. Willie Alford still at Club 121? A. No.

Q. Was he employed at all?

A. No, not at all.

Q. How did you and Mr. Alford live during that period of time?

A. I had a little earnings from what I made at the Combat Cafe, and for enough that month. That first month that is what we were living on. The following month, or August 13th, that is when he persuaded me to go to the practise of prostitution.

Q. When you say Mr. Alford persuaded you to go into prostitution, what do you mean by that exactly, what did he do to persuade you?

A. Well, he was angry. By talking to me at first and [14] calling me names, and if I don't do what he says he knows of ways of handling a woman like me.

Mr. Marshall: I am sorry, I did not get that answer.

The Court: You will have to speak a little louder, Mrs. Alford, please.

A. If I don't do what he says he will bust my

(Testimony of Edna Rodrigues Alford.)

face. That he has ways of handling a woman like me. That is what he said.

Q. What was it then he told you to do?

A. To go ahead and practise as a prostitute.

Q. Practise prostitution? A. Yes, sir.

Q. This, Mrs. Alford, was said to you before you were married? A. Yes, sir.

Q. You testified in effect that he said that he has a way of treating women like you, is that right?

A. That's right.

Q. Did you understand what he meant by that?

A. Not clearly. I did not understand him at first. Then in a little while when we started arguing, we had an argument before I started to work, naturally I just had to go out because he was calling me names, and said if I don't do anything he would bust the side of my head.

Q. He said he would bust the side of your head?

A. Yes, sir.

Q. Were you afraid of him? [15]

A. I was afraid that night. What could I do? I just go ahead and do what he asked me to.

Q. When you said you went ahead and did what he wanted you to do, tell the Court how you went about the practise of prostitution?

A. He made a contact with a Filipino boy that I don't know. He made a contact for me to meet this fellow at a certain place up Kalihi Valley.

Q. Did you meet that fellow? A. Yes, sir.

Q. Where did you meet him?

A. Somewhere on Liliha Street, and from there we proceeded to Kalihi Valley.

(Testimony of Edna Rodrigues Alford.)

Q. Who took you to Liliha Street?

A. The Filipino boy.

Q. The Filipino boy? A. Yes, sir.

Q. You don't know who he is?

A. I don't know his name.

Q. Did this Filipino boy know your husband?

A. Yes, they knew each other.

Q. Then when you went to Kalihi Valley, or in that area, did you carry on prostitution?

A. Yes, sir.

Q. You earned some money?

A. Yes, I did.

Q. Do you remember approximately how much it was, $5.00, $10.00, $1.00? [16]

A. It was $10.00, sir, for each person.

Q. $10.00 per person?

A. $10.00 for each person.

Q. How much did you earn that night?

A. I earned $100.00 that night.

Q. That is ten men at $10.00 per man?

A. Yes, sir.

Q. What did you do after you were through?

A. After I was through working I went home and gave the money to William Alford.

Q. Where were you living at that time?

A. We were living at 1130 Maunakea Hotel. That is on Maunakea Street, 1130.

Q. Now, that was on what day?

A. It was August 13th.

Q. 194—— A. 1946.

Q. From that day, up to and including the day

(Testimony of Edna Rodrigues Alford.)

of your marriage, did you continue your prostitution? A. Yes, sir.

Q. Was Mr. Alford working at any place during that period?

A. He was working then at the Honolulu airport as a bell hop for three months, 1948—no was '47, I guess. It was for three months, and he had a fight there and he was discharged from that time.

Q. From this time up to your marriage did you at any time attempt to get away from Mr. Alford, or try to get away from this game called prostitution? A. Yes, I did. [17]

Q. When was that?

A. That was July, the date I am not certain, 1948, it was, and we were living at the Palama Hotel, Palama District, and I ran away that evening. Before we moved to the Palama Hotel we were staying at Kalihi Street, then I ran away that evening. I stayed that night with my aunt in Waipahu. The following morning I came down to pick up my clothes, and I met Willie Alford on the street in the Palama District. He begged me to come back to him, and if I would come back to him he will promise he will never make me go back in this prostitution, that he will work and support me. That is the promise he made, but it didn't go through after one month.

Q. It didn't go through? A. Yes.

Q. What happened?

A. The usual thing, we quarreled about money, that he didn't have any money in his pocket and the

(Testimony of Edna Rodrigues Alford.)

rest of his friends in town were driving around in nice cars with their pockets full of money all the time, why don't you go ahead and do something about it, so I didn't care.

Q. At any time did he manhandle you?

A. That was '46 and '47.

Q. What did he do to you?

A. In '46—I guess '47, that was on Pauahi Street, I was hit on the two sides of my cheeks. That was New Year's Eve.

Q. What caused it? [18]

A. He had a few drinks. We just quarreled, and that ended by his bringing up about money, about earning some money.

Q. Before you went into prostitution did Mr. Alford promise you anything?

A. Oh, yes, lots of things. He said I would have nice clothes, a home, car, jewelry, and things like that.

Q. Did you receive any of these things?

A. Well, I had a car, but I didn't have the pleasure to own that car under my name. It would always be under his name.

Q. Under Mr. Alford's name? A. Yes, sir.

Q. Now, every time you made some money up to the time you were married, did you hand that money over to Mr. Alford? A. That's right.

Q. This money you earned was from prostitution? A. Yes, sir.

Q. After your marriage to him did you continue in prostitution? A. Yes, sir, that I did.

(Testimony of Edna Rodrigues Alford.)

Q. Where were you living?

A. We were living on Palama Street, Palama Hotel. That is when we were married in 1948. From there to 1614 Kamohoalii Road, where he is living now.

Q. Did Mr. Alford say anything about your going out to practise prostitution, being a prostitute, after you were married? [19] A. Yes, he did.

Q. Did he encourage or discourage you?

A. He encouraged me to go right ahead, he said there was no harm in doing it.

Q. Your prostitution was carried on on this Island? A. I went to the other Islands too.

Q. What other Islands did you go to?

A. Lanai and Hilo. Mostly up in Hilo.

Q. Did you go to Kauai?

A. I did go to Kauai, Molokai.

Q. Did you practice prostitution on those Islands? A. Yes, and this Island too.

Q. Mrs. Alford, you know that Mr. Alford is being charged under five counts of having received money from you which you earned from prostitution? A. Yes.

Q. For which he is being tried today?

A. Yes, sir.

Q. I would like to take you back, bring you up to date, on or about October of 1949, do you recall whether you were practising prostitution about that time? A. Yes, sir, I was.

Q. You were a prostitute then?

A. Yes, sir.

(Testimony of Edna Rodrigues Alford.)

Q. Where were you practising, was it on this Island or some other Island?

A. I was working at Hilo, Hawaii, sometimes.

Q. Hilo sometimes? A. Yes. [20]

Q. Were you living in Hilo with Mr. Alford, or were you just making trips to Hilo?

A. Just making trips to Hilo.

Q. Mr. Alford was living here in Honolulu?

A. Yes.

Q. You considered your home to be on Oahu?

A. Yes, sir.

Q. When you made those trips to the other Islands how long a period did you usually stay?

A. I usually stayed two or three weeks, two months, three months at the most.

Q. Sometimes you stayed just about a week?

A. Two weeks.

Q. How did you determine the time when you should return?

A. When I returned there, I know about when the plantations are being paid, and when I go back I usually go back on the 3rd or the 4th of the month and come back here again following up the end of the month, and then go back again the first or second week of the next month.

Q. And when you stayed on the other Islands, when you stayed two or three months, did you stay there because business is good or bad, or for what reason?

A. I stayed there for the three months because it is good.

Q. If you stayed there for a period of two

(Testimony of Edna Rodrigues Alford.)

months, three months, or even two weeks, what did you do with the money you have made while on that Island?

A. I always sent the money to Willie [21] Alford.

Q. What?

A. I always sent the money to Willie Alford.

Q. Why did you send the money to Willie Alford?

A. He would write to me, he would need some money—if I don't mind sending him the money. If I made some money to send it right away to him. I would also write to him right away and send it special delivery.

Q. How did you send the money to Willie Alford?

A. He told me to have the money folded up double in my envelope and mark it special delivery, and that is how I sent it.

Q. And the contents of your letter was with reference to the money? A. Yes, sir.

Q. What else, if anything, did you refer to in the letter?

A. Nothing else. I didn't have anything more to write to him, just sent the money and say, "Hello, here is the money I am sending. I hope you receive it." That's all.

Q. Was this sent by air mail or boat mail?

A. Air mail.

Q. Registered letter or special delivery?

A. Special delivery.

(Testimony of Edna Rodrigues Alford.)

Q. Why did you send it special delivery?

A. That is what he wants me to do.

Q. Mr. Alford told you to send all the money by special delivery? A. Special delivery.

Q. Do you know whether Mr. Alford had received any of [22] the money or not?

A. Yes, he did.

Q. You do know he got the money?

A. Yes.

Q. Edna, how do you know Mr. Alford had received the money?

A. Because he would write to me back that he had received the money what I had sent him.

Q. He would write to you? A. Yes, sir.

Q. Every time you would send him money he would write a letter like that to you?

A. Yes, sir.

Q. Do you have those letters with you?

A. No, sir, that I do not have. Willie Alford destroyed all those letters.

Q. Mr. Alford destroyed the letters?

A. Mr. Alford destroyed what I wrote to him saying that I would send the amount of money, and a certain book that was in my suitcase. I had all the proof, the dates and months, the month and the money I have made for pretty nearly four years.

Q. Are you testifying that it was your practice to keep a note book? A. Yes, sir.

Q. In which you recorded the amounts you earned?

A. The amount I earned, and the amount of

(Testimony of Edna Rodrigues Alford.)

trips I made to the other Islands, the amount I made over here. [23]

Q. Did you record in it the amounts you sent to Mr. Alford also?

A. I recorded June 13th and 23rd.

Q. Other than the specific date that you recall now, every time you sent letters or money to Mr. Alford, did you make it a point to record it in this book? A. Yes, sir.

Q. When you said the amount of trips you made, do you intend to tell the Court that you recorded, let us say, five trips in the month of July, or actually put down the date when you actually left Honolulu?

A. Actually put the date down when I left Honolulu, and when I come back from the other Islands.

Q. When you you stop practising prostitution?

A. I stopped practising prostitution on September, 1950.

Q. 1950? A. That's right.

Q. From October, 1949, to September of 1950 were you practising prostitution as you have just testified? A. Yes, sir.

Q. You were going to the different Islands?

A. Yes, sir.

Q. You were sending the money to Mr. Alford?

A. That's right, sir.

Q. Now, your fare to the other islands, plane fare, did you buy the tickets yourself, or did Mr. Alford buy them for you?

A. Mr. Alford would make appointments for me.

Q. Make what? [24]

(Testimony of Edna Rodrigues Alford.)

A. Make appointments for the trip, and he sometimes picks it up, sometimes we pick up the ticket together. All I have to do is go to the airport. He brings me to the airport and I take the plane.

Q. By what airline did you usually go?

A. Hawaiian Airlines.

Q. On your return trip, did you buy the ticket, or did Mr. Alford buy any tickets?

A. I have to buy my own ticket.

Q. And this ticket that you bought was it bought out of money you had taken from here from prostitution, or from money you earned from prostitution on the other Islands?

A. From my practising of prostitution.

Q. Usually when you leave Honolulu for the other Islands do you take any money with you?

A. Sometimes I will take $5.00, sometimes I don't have but a dollar in my pocket book. I have to practise as a prostitute here in order to have some money to go with me over to the other Islands, and leave him some money for spending.

Q. Does he give any of this money to you after you have earned it in the practise of prostitution, after you earned this money does he give you spending money?

A. The amount he gave me was $20.00 for my spending money.

The Court: A month?

The Witness: A week, sometimes. [25]

Q. By what Airline did you usually go to the other Islands?

(Testimony of Edna Rodrigues Alford.)

A. Hawaiian Airlines. I only flew TPA once to Kauai.

Q. The rest of the time Hawaiian Airlines?

A. Yes.

Q. When you returned from the other Islands, Mrs. Alford, did Mr. Alford meet you at the airport? A. Yes, sir.

Q. He was waiting for you? A. Yes.

Q. How did he know when you were coming back?

A. He would tell me to write him as soon as I am getting back and he will meet me at the airport.

Q. Going back to the months of October, November and December of 1949, you testified you were practising prostitution? A. Yes, sir.

Q. And for those three months do you know on what Island you were?

A. I was on the Island of Hawaii, at Hilo, October, November, December.

Q. Of 1949? A. 1949.

Q. Did you come back to Honolulu during those three months, or stay there all of the time?

A. I stayed three months, and returned December, 1949.

Q. Do you recall whether you had sent Mr. Alford any money or not during that time?

A. Yes, I did, but I don't recall the date on that year. [26]

Q. Do you know whether you had sent him any money in October, 1949? A. I do.

Q. November, 1949? A. I do.

(Testimony of Edna Rodrigues Alford.)

Q. December?

A. December, that is when I came back. October, November.

Q. About how often did you send money to him?

A. I usually send twice a month, sir.

Q. Twice a month? A. Yes, sir.

Q. Were there times when you sent it more often? A. No.

Q. Usually twice a month? A. Yes, sir.

Q. When you were there during the months of October, November and December, where were you staying, at a hotel?

A. I was staying at Bonifacio Bongalon's apartment.

Q. During those three months, October, November, December, when you sent the money to Mr. Alford, do you recall whether he had acknowledged receipt of such money—did you receive letters from him saying he had received the money?

A. Yes, yes.

Q. Taking you to February, 1950, do you recall where you were?

A. I left Honolulu February 3rd for Hilo. I returned to Honolulu from Hilo on February 26th.

Q. Then you didn't stay a full month in Hilo?

A. No.

Q. You left on the 3rd and returned on the [27] 26th? A. Yes, sir.

Q. During that month you were also practising prostitution?

A. Practising prostitution, yes, sir.

(Testimony of Edna Rodrigues Alford.)

Q. You sent money to Mr. Alford?

A. Yes, I did.

Q. Do you know about how much, and when you sent the money to Mr. Alford during that month?

A. There was February 11, 17 and the 25th, amounting to $250.00 that month.

Q. You went there on February 3rd, and about a week later you sent him some money?

A. Yes.

Q. About how much?

A. I would send him $100.00 first in one week.

Q. And February 17th?

A. 17th and the 26th.

Q. During the month of February you had sent him money about once every week? A. Yes.

Q. About $100.00 each time? A. Yes.

Q. $300.00 altogether?

A. That was $250.00 for that month.

Q. One time you just sent $50.00?

A. Yes, sir.

Q. And Mr. Alford acknowledged receipt of this money? A. Yes, sir.

Q. Did you send it all special delivery, as you testified? A. Always special delivery. [28]

Q. Now, on count No. 3 Mr. Alford is being charged with receiving money during the month of March, 1950? A. Yes, sir.

Q. Will you testify as to that month?

A. I left Honolulu for Hilo March 3rd, and returned to Honolulu from Hilo March 25th, and on March 10th and 18th and 22nd I sent Willie Alford

(Testimony of Edna Rodrigues Alford.)

$300.00 for that month, practising as a prostitute.

Q. This also was sent by special delivery?

A. Special delivery.

Q. You received letters from Mr. Alford?

A. I received letters from Mr. Alford.

Q. Taking you to April, 1950?

A. I left Honolulu for Lanai on April 4th, and from Lanai I left for Hilo April 10th. April 7th I sent Willie Alford $45.00 and kept $100.00 for myself.

Q. On April 7th you sent the money from where?

A. From Lanai.

Q. You were on Lanai for about a week then?

A. Yes, sir.

Q. When you left Lanai you did not return to Honolulu, but went to Hilo? A. Yes.

Q. How long did you stay in Hilo?

A. Until July 15th, sir, from April until July 15th, until I returned here July 15th to Honolulu.

Q. During the month of April, 1950, did you send money to Mr. Alford from Hilo? [29]

A. Yes, sir, that was on April 14th and 28th I sent $250.00.

Q. $250.00? A. Yes, sir.

Q. And May?

A. May 13th and May 23rd and 28th I sent him $450.00.

Q. Then during the month of June?

A. June—no, May I sent him $300.00. It was June I sent $450.00, June 10th, June 13th, I had the dates mixed, June 13th, 23rd and 28th, that is when I sent $450.00

(Testimony of Edna Rodrigues Alford.)

Q. Each time you sent Mr. Alford money it was in denominations of $100.00 or $150.00?

A. $100.00, $150.00, sir.

Q. While you were on these other Islands did you keep any of the proceeds from prostitution for yourself?

A. I kept about $20.00 for myself and buy things that I wanted, that's all.

Q. Food and things like that?

A. Yes, sir.

Q. Let's limit ourselves to Hilo, when you were in Hilo did you mail the letters to Mr. Alford from the Hilo Post Office? A. Yes.

Q. How did you go to the Hilo Post Office?

A. I had Mr. Bongalon take me, because he was a taxi driver. I would call him and make him drop me off at the Hilo Post Office, and he knew, he would know about it. I told him that I was sending Willie Alford some money [30] that he wants. He is the person that knows that I sent William Alford that money by special delivery.

Q. For the period of 1950, 1949, 1950, for almost a year you seem to have been rather definite about the dates on which you sent the money——

A. Yes, sir.

Q. Is this because of your having written it down in a note book, or for any other reason?

A. No, because I had that all written down in a note book.

Q. And all that was written down in your notebook? A. Yes, sir.

(Testimony of Edna Rodrigues Alford.)

Q. When you talked to the police officer in 1950, did you talk to the police officer about those things?

A. Yes.

Q. That was when?

A. September 23rd I returned from Hilo, that evening, the same evening that I was taken from the jail of Hilo, Hawaii.

Q. You reported to the police officer here?

A. Reported directly to the police station.

Q. These dates you have testified to, did you report those to the police officer? A. Yes.

Q. When you talked to the police officer with reference to these dates were they fresh in your memory?

A. Yes, sir, they were still fresh in my memory.

Q. After you had talked to me you did read your statement which you had made to the police officer, did you not? A. Yes, sir. [31]

Q. And that statement refreshed your memory?

A. Yes, sir.

Q. Now, you say you came from the police station, or jail, in Hilo, in September, 1950?

A. Yes, sir.

Q. What happened there?

A. I was picked up on account of practising prostitution. I couldn't raise the fine. That fine on me by Judge Olds was $150.00 when I was picked up as a prostitute there in Hilo, Hawaii, on September 15th, 1950, and I was charged and given sentence, thirteen months' suspended sentence. When I was picked up, then a week I was in jail

(Testimony of Edna Rodrigues Alford.)

after that because I couldn't raise the money, and I had called up to William Alford saying "send me $150.00," and he sent word to me "Why don't you tell your friends to help you out," so I didn't bother him about it any more. That was the reason I was in jail for five days in Hilo County.

Q. Did Mr. Alford at any time send you the $150.00?

A. Yes, a week after that he had sent it on. A TPA pilot brought it to the police station. I don't know what was written in the envelope with the money in it.

Q. And you were released?

A. I was released the same evening and supposed to take the plane that same evening.

Q. Did you come back? A. Yes.

Q. By TPA? A. By TPA. [32]

Q. Who had paid for the ticket?

A. Willie Alford, I guess.

Q. When you came back to the airport here in Honolulu was Mr. Alford there?

A. Yes, he was right there.

Q. Did anything unusual happen there that night?

A. To tell the truth I didn't want to go back to Willie Alford that evening. He insisted on my going back to my home. I told him I didn't want to have anything more to do with him, and he wanted to make a fuss about it. He grabbed hold of my suitcase and took off when he knew I was going to call for the police officer.

(Testimony of Edna Rodrigues Alford.)

Q. Did you call the police officer?

A. Yes, that was the reason, the very reason I spent all evening there, 7:35 when I arrived until 11:00 or 11:30 that night at the police station making statements against William Alford.

Q. The statement you read in my office last week was the statement you gave to the police officer on that date? A. Yes, sir.

Q. Now, you said you had a suitcase at the airport and Mr. Alford took it away?

A. He already grabbed it from the counter. I told him to leave it alone, but he already grabbed the suitcase and took it in his car and drove off, so that evening I have to have a police officer and matron go with me to where he was staying and demanded by suitcase. He said he wouldn't give it to me because it doesn't belong to [33] me. How else it doesn't belong to me, because all my things were in there, nothing belongs to him, and the following day, that was Monday, he already brought it up to my son's where I am staying now. When I looked in my suitcase, I quickly wanted to look for that note book, it wasn't there, all missing.

Q. The note book wasn't in the suitcase?

A. It wasn't there any more.

Q. When you left Hilo did you have the note book in the suitcase? A. Yes, I did.

Q. When the suitcase was brought to you the next day it wasn't there? A. It wasn't there.

Q. These letters of acknowledgment that Mr. Alford used to write to you each time he received

(Testimony of Edna Rodrigues Alford.)

money from you, were you in the habit of keeping those letters, or disposing those letters?

A. I was keeping them for a while. I don't know what came up to his mind, he said, "let's destroy these letters. We might get raided some day and I don't want any evidence to be around." He destroyed his letters and naturally I had to destroy my letters. I didn't have to be afraid of destroying my letters because I have no means of hiding anything from the law. It was him.

Q. These letters were destroyed in Honolulu at the place where Mr. Alford is living now?

A. Yes. [34]

Q. What did he say the reason was for destroying the letters?

A. He said we might get raided.

Q. Since the time you talked to the police officer did you continue to live with Mr. Alford?

A. No, sir.

Q. You moved out?

A. I moved out and I am staying with my son at 425 Kuulei Road.

Q. This son is from a prior marriage to Salamango? A. Salamango, yes, sir.

Q. All of these things you have testified to happened in the City and County of Honolulu, Territory of Hawaii? A. Yes, sir.

Q. You are sore about what Mr. Alford did to you now? A. I beg your pardon.

Q. You have ill-feeling toward Mr. Alford?

A. I still do.

Q. What caused this ill-feeling?

(Testimony of Edna Rodrigues Alford.)

A. By him putting, making me as a prostitute, by taking me as his wife. That would be different, but having me as a prostitute, that is all he wanted me for.

Q. Do you know whether Mr. Alford regards you as a prostitute, or if he has any other girls he uses as a prostitute?

A. Yes, he did have a woman practice as a prostitute.

Q. How do you know?

A. Because this woman stayed and slept there in my house where I stayed. [35]

Q. That is the home you shared with Mr. Alford here in Honolulu? A. Yes, sir.

Q. And she carried on prostitution there?

A. Yes, she even went down to Hilo to practice as a prostitute.

Mr. Marshall: Object to that, if your Honor please, without any foundation being laid, just a bare assertion.

The Court: It has been asked and answered.

Mr. Kamo: No further questions.

Cross-Examination

By Mr. Marshall:

Q. Mrs. Alford, what is your age?

A. I am thirty-four.

Q. You have been married before?

A. Yes.

Q. How many times? A. Twice, sir.

(Testimony of Edna Rodrigues Alford.)

Q. Twice before your marriage to Willie Alford? A. Three times with Alford.

Q. How old were you when you were married the first time? A. Fifteen to sixteen, sir.

Q. How long were you with your first husband?

A. Three years.

Q. You realize, Mrs. Alford, that the testimony that you have given in this court today can subject you to prosecution? [36] A. Yes, sir.

Q. Have you been promised any immunity?

A. What do you mean?

Q. Has anyone told you if you got up on the stand—— A. No, sir.

Q. No one has promised you anything?

A. No one has promised me anything.

Q. How many children do you have?

A. I have three, two from my first husband, and one from my former husband, Salamango.

Q. Your second husband? A. Yes, sir.

Q. I believe it came out the oldest boy was seventeen?

A. The youngest is seventeen, next to the oldest is nineteen, my oldest one is twenty.

Q. Your first child was born prior to your marriage, your first marriage? A. Yes, sir.

Q. How did your first marriage terminate, how did it end? A. It ended by family quarreling.

The Court: By divorce?

The Witness: Divorce.

Q. When was that? A. That was 1932.

Q. When was your second marriage?

(Testimony of Edna Rodrigues Alford.)

A. My second marriage was in 1934, in Hilo, Hawaii.

Q. How did you support yourself from 1932 to 1934? A. Well, I was a taxi dancer then. [37]

Q. In this house where you are living at the present time, who lives there besides yourself?

A. Thomas Angay (?) my son's father, my son and I, and another old man.

Q. You are living in the house with your former husband?

A. Yes, I am paying as a boarder. I have a room by myself. I am not living with him, or having any more relationship with my former husband.

Q. Do you plan to divorce this defendant?

A. Yes, sir.

Q. Are you in love with anyone else at this time?

A. No.

Q. Just what are your feelings toward the defendant?

A. I think they were characterized for you.

Q. I would like you to describe it.

A. As I told the prosecutor, Mr. Kamo, I have still ill-feeling toward him on account of the way he treated me, instead of taking me as his wife, if he ever loved me he would not have had me go there and practice this prostitution.

Q. Well, you lived with the defendant two years prior to your marriage? A. Yes.

Q. And during that time you were engaged in prostitution? A. Yes, sir.

(Testimony of Edna Rodrigues Alford.)

Q. Now, Mrs. Alford, when did you first begin practicing prostitution?

A. 1946, August 13th.

Q. You have testified that on August 13, 1946, you started practicing prostitution, you are sure of that date? [38]

A. I am certain of it. I will never forget that date.

Q. On August 13, 1946, you said the defendant said to you, "I have ways of treating a woman like you?" A. That is what he said.

Q. You said he was going to hit you across the head, slap you across the side of the head?

A. Yes.

Q. Was anything else said by the defendant?

A. He kept nagging until I—naturally I just couldn't stand it, just have to go.

Q. When you left the house where did you run into this Filipino?

A. Somewhere on Liliha Street. I don't know the address.

Q. How did you happen to meet the Filipino?

A. Through Willie Alford, he makes the contact.

Q. Tell me just what happened?

A. He makes the contact with the Filipino guy.

Q. What do you mean?

A. Contact for practicing prostitution.

Q. Let's go back a minute, you are in the dwelling house when you and Mr. Alford quarreled, he has told you to go out and make some money?

(Testimony of Edna Rodrigues Alford.)

A. Yes, sir.

Q. What happened after you turned around and left the house?

A. Turned around and left the house.

Q. Were you by yourself?

A. I went to meet the Filipino guy. [39]

Q. Was anyone with you at that time?

A. I was by myself.

Q. How did you know where to go?

A. Alford told me to meet the Filipino guy on a certain street.

Q. Up until that time you had never been a prostitute? A. Yes.

Q. You went out that night and made $100.00?

A. Yes, sir.

Q. The first night? A. The first night.

Q. You have mentioned that when you were in Hilo, and these various other places, you frequently took off from Honolulu with $1.00, or possibly $5.00 in your pocketbook? A. That is true.

Q. Why did you send, when you were in Hilo and away from Alford, why did you send to him all your money except a few dollars?

A. Because he demands it to send it to him. He don't want me to keep that amount of money.

Q. Did he have any way of knowing how much money you were making?

A. If I tell him of the amount of money I am making he will know, if I don't tell him he doesn't know. I was true to him, I told him I made so and

(Testimony of Edna Rodrigues Alford.)

so much, maybe $300.00 that month, and I sent it all to him.

Q. Are you trying to tell the Court that at that time you were in love with Willie Alford and wanted to send [40] him everything you made?

A. He demands it. That is what men like him demand of women, their earnings.

Q. What I am trying to find out is, isn't it a fact that unless you told him how much you were making he wouldn't know whether you made $50.00 or $100.00 or $300.00 in one week?

A. He would know that.

Q. How would he know that, he wouldn't be there?

A. He would know because other girls go to the other Islands and come back and tell him "we are doing good over there, I don't see why your wife couldn't make good."

Q. Isn't it true he wouldn't know whether you made $100.00 or $150.00?

A. He would know that because I would write to him the amount of money I make that month.

Q. Suppose you didn't write, he couldn't tell how much he made?

A. If I don't write and tell him, if I don't send him the money, he usually wait at home, just sitting there and waiting for me to hand it down to him when I come back from the other Islands.

Q. Mrs. Alford, what I am trying to find out, here you were in possession of the money, you were there all by yourself, why would you turn around

(Testimony of Edna Rodrigues Alford.)

and send all your money to Mr. Alford, couldn't you possibly have kept back $50.00 each week?

A. No. [41]

Mr. Kamo: Objection——

The Court: The question has already been answered, Mr. Kamo.

Q. I believe you testified that you read over the statement that you had made initially to the police before coming to Court? A. Yes.

Q. How long ago did you read that statement?

A. Oh, from that date, September to——

Q. I am sorry, I don't believe you understand the question. A. Yes, I did.

Q. When was the last time you read that statement?

A. The last time was on January, up to February.

Q. When did you give that statement to the police?

A. I gave that statement September 23, 1950.

Q. Mrs. Alford, when you read in that statement, when you testified that on July 14th and the 28th you sent $250.00 from Hilo——

A. Yes, sir.

Q. Were you testifying to that because you read it in your statement? A. No.

Q. Or because you remembered?

A. Because I knew it.

Q. Then you weren't telling the truth a while ago when you answered Mr. Kamo's question that

(Testimony of Edna Rodrigues Alford.)
you read the statement and it refreshed your memory?

A. I did not, because the statement, when I gave it to [42] the police I remembered the dates.

Q. You didn't remember that on July 14th you sent some money from Hilo, you remembered that because in your statement you said that on July 14th you sent some money from Hilo?

Mr. Kamo: Don't answer that. I know what counsel is getting at. I object on the ground that it is a mistatement of what I have inquired into, to which she testified that when she made the statement to the police officer she remembered the exact date and the amount when she had sent money to Mr. Alford, which statement was recorded, and that is the date and that is the amount that she remembers. That is her statement in the testimony on direct.

The Court: I will permit the question. I think Mr. Marshall is trying to determine whether she is testifying after having refreshed her memory from reading the statement she made to the police. (To the witness:) Do you understand the question?

The Witness: Yes, sir.

The Court: Will you answer the question?

A. That's right. I remember the date July 14th and 28th I sent William Alford $250.00.

Q. You remember right now that on July 14th you sent Willie Alford $250.00 from Hilo?

A. Yes, sir.

Q. What day of the week was July 14th?

(Testimony of Edna Rodrigues Alford.)

A. How would I know what day of the week it was. [43]

Q. How do you know what the date was?

A. Because I had written it down in my note book, as I told you, and that William Alford had taken that note book. He knew very well it would be against him.

Q. You no longer have the note book?

A. No.

Q. You gave this statement to the police shortly after the note book was stolen? A. Yes.

Q. You read that statement not long ago?

A. I know all those things which I have written in my own note book. I should know it.

Mr. Kamo: May we take a short recess at this time.

The Court: Very well. The Court will take a short recess.

(Recess.)

Continuation of Cross-Examination

By Mr. Marshall:

Q. Now, Mrs. Alford, you have testified that you have actual present remembrance of having sent this money to the defendant on the dates you have named here? A. Yes, sir.

Q. Will you tell me, describe what you did on February 11th, 1949, and 1950, when you sent the money to your husband?

A. Describe what I did?

(Testimony of Edna Rodrigues Alford.)

Q. Yes. [44]

A. Practicing as a prostitute as usual.

Q. I am asking you how you sent the money to Mr. Alford from Hilo?

A. By special delivery.

Q. Where did you get the envelope?

A. Buy it.

Q. Where? A. In Hilo Drug Store.

Q. Where did you get the stamp?

A. From the post office in Hilo.

Q. Where did you write the little note when you sent the money?

A. Where I am staying at.

Q. Then what did you do?

A. Mailed it together with the money.

Q. Do you remember where you mailed the letter? A. Where I mailed it?

Q. Yes.

A. Hilo Post Office.

Q. I will pick another date, do you remember being in Hilo in May, 1950? A. Yes, sir.

Q. You sent money from there on the 15th and the 23rd and the 28th, are those the correct dates?

A. Yes.

Mr. Kamo: Objection, your Honor, she testified——

Mr. Marshall: She testified she sent money on May 15th, 23rd and 28th.

Mr. Kamo: That is a matter not in evidence. [45] It is a mistatement of the evidence.

(Testimony of Edna Rodrigues Alford.)

Mr. Marshall: That was my understanding of the testimony of the witness.

The Witness: May 10th, 19th and 21st.

The Court: I didn't write down the dates in my notes, what were they again?

The Witness: May 10th, 19th and 21st, your Honor.

Q. (By Mr. Marshall): Directing your attention to May 19th, when you allegedly sent money to Mr. Alford from Hilo, tell the Court where you got your envelope that day?

A. Well, I usually buy my envelopes all one time so that I don't have to go back to the drug store for another one.

Q. Do you remember where you got the stamp that day?

A. Same place, Hilo Post Office.

Q. Then you repeated the same procedure?

A. Repeated the same thing, special delivery.

Q. Directing your attention to May 21st, tell the Court how you sent the money to Willie Alford from Hilo that day?

A. The same as always, the usual thing.

Q. Where did you get your stamp that day?

A. Post office, sir.

Q. Is the Hilo Post Office open on Sunday?

A. Sometimes I buy my stamps in a booklet. Sometimes I run out of stamps.

Q. Didn't you just say you bought your stamp at the Hilo Post Office that day?

A. Yes. [46]

(Testimony of Edna Rodrigues Alford.)

Q. On May 21st?

A. Yes. The post office naturally is closed on Sunday.

Q. How did you get the stamp on that day, that Sunday?

A. I go and ask some friends of mine.

Q. You don't know whether you bought the stamp at the post office?

A. It is not the day that I bought the stamp, it is the day when I sent the money. It is not what we are arguing about, the date I bought the stamp, but the date I sent the money.

Q. I will now ask the question we had a while ago, isn't it a fact that you are testifying to what you read in the statement that you gave the police?

A. Yes.

Q. Rather than your actual remembrance of doing a particular thing on May 11th or 12th, or May 28th, you got all those dates from this police report?

A. Yes, because I gave them that statement.

Mr. Marshall: At this time I move to strike all this testimony as being inadmissible. She has testified to the contents of a hearsay document. Even if she made the statement under the rules of evidence it is not direct evidence and has no probative value.

The Court: There is some confusion. I did not gather that she is testifying directly from the police report. She may have answered one question that way. I think further cross-examination will clarify the situation that her memory was refreshed from

(Testimony of Edna Rodrigues Alford.)

reading the police report. [47] She has testified she made this statement in September when the facts were fresh in her mind, and the book was lost, then she read the report over and that is how she remembers. That is the impression I got. Motion to strike will be denied.

Mr. Marshall: May we have an exception?

The Court: Yes, Mr. Marshall.

Q. Did I understand you to testify that you had been fined $150.00 in Hilo, and that you telephoned Mr. Alford to send you the money to pay the fine? A. Yes, I did.

Q. Did you make that telephone call personally?

A. No, I had a friend of mine make the telephone call.

Q. Who was the friend who made the telephone call?

A. I just knew him briefly in Hilo. He was a part-Hawaiian, part-Filipino guy.

Q. Did you ever give him any money?

A. No, sir. I never gave any money to anyone except Willie Alford.

Mr. Marshall: No further questions.

Mr. Kamo: No further questions.

The Court: You may step down, you are excused.

(The witness was excused.)

Mr. Kamo: Call Mr. Muraoka.

KATZUMI MURAOKA

called as a witness, for and on behalf of the Territory, being first duly sworn, testified as follows: [48]

Direct Examination

By Mr. Kamo:

Q. You are Mr. Katzumi Muraoka?

A. Yes, sir.

Q. You are employed at the Hawaiian Airlines accounting office? A. Yes, sir.

Q. This is located on Merchant and Fort Streets? A. Yes, sir.

Q. Mr. Muraoka, you are in charge of this accounting office, is that right? A. Yes.

Q. In your accounting office, or as part of your work, you have custody of all the records of flights made by passengers from one island to the other?

A. Yes, sir.

Q. You have these ticket stubs, or whatever you call that portion of the ticket that they use?

A. Yes, sir, that's right.

Q. You were asked by me to check your records, and earlier by the police officer to check the records in your office to determine whether Mr. William Lafayette Alford bought any tickets for Mrs. Lafayette Alford from Honolulu to the other islands, is that right? A. Yes, sir.

Q. Did you make that check?

A. I did, yes.

Q. Do you know, or were you able to find any, if not all, of the tickets that Mr. Alford bought for Mrs. Alford? [49]

(Testimony of Katzumi Muraoka.)

A. I have here a ticket which was purchased away back in August of 1950.

Q. August, 1950? A. Yes, sir.

Q. This ticket was purchased by whom?

A. We don't know exactly who purchased this ticket. The ticket was purchased at Hilo. A wire was sent to Honolulu for passage for Mrs. Edna R. Alford from here to Hilo, on August 14th.

Q. And on the other occasions when the police officer was checking the records with you were you able to determine whether any tickets were bought by Mr. Alford for Mrs. Alford?

A. I believe several, four or five tickets.

Q. And the purchaser of the ticket was who?

A. We don't know the purchaser. We know the traveler of the ticket.

Q. Who was the traveler of the ticket?

A. Mrs. E. Alford.

Q. Where was the ticket purchased?

A. Down town office.

Q. Your records do not show who bought the tickets? A. No.

Q. No other tickets? A. No.

Mr. Kamo: No further questions.

Mr. Marshall: No questions, your Honor. [50]

Q. (By the Court): Do your records show the dates of the tickets issued to Mrs. E. Alford and her destination?

A. On the ticket stub, all these coupons specify date of purchase, date of flight, flight time of flight.

(Testimony of Katzumi Muraoka.)

Q. You say you do not have a record of who purchased the ticket? A. No, we don't.

The Court: That is all.

Mr. Kamo: May I ask a question?

The Court: Yes.

Q. As to these tickets you were able to locate, do you remember the dates of flight, when they flew?

A. I gave that information to the police officer.

Q. Do you remember?

A. I don't recall to the best of my understanding.

Q. You did have those dates? A. Yes.

Q. What are those dates?

A. I don't recall exactly right now. I believe it was—I have several here.

Mr. Marshall: I believe the witness stated that he didn't recall.

Q. Have you made a search for the dates?

A. I made a search, July 18, 1950, Honolulu to Hilo; on August 6th Honolulu to Lanai, 1949, January 10, 1950, Honolulu to Hilo, August 14, 1950, Honolulu to Hilo.

Mr. Marshall: I would like to have those [51] dates made available to me. I couldn't follow the witness.

The Witness: July 18, 1950, Honolulu to Hilo; on August 6th, Honolulu to Lanai, 1949, January 10, 1950, Honolulu to Hilo, August 14, 1950, Honolulu to Hilo.

The Court: Any questions, Mr. Marshall?

(Testimony of Katzumi Muraoka.)

Mr. Marshall: Could it be possible to have a five-minute recess to get those dates?

The Court: Anything further from this witness?

Mr. Marshall: No, your Honor.

The Court: You are excused, Mr. Muraoka.

(Witness excused.)

Mr. Marshall: The Prosecution agrees on the recall of the complaining witness just for one question.

The Court: Very well. Mrs. Alford, will you resume the witness stand, please.

Whereupon

MRS. EDNA RODRIGUES ALFORD

resumed the witness stand.

Continuation of Cross-Examination

By Mr. Marshall:

Q. Mrs. Alford, where were you born?

A. I was born in the Philippines.

Q. Have you ever been naturalized?

A. Not yet.

Q. You do have a registration card, do you not?

A. Yes.

Q. Do you have that card with you?

A. No, I lost all those cards, lost my wallet once, and had to get my registration card again. [52]

Q. Isn't it a fact that the records at the Immigration Station show that you are thirty years of age?

(Testimony of Mrs. Edna Rodrigues Alford.)

Mr. Kamo: I object to the question, your Honor, immaterial, outside the scope——

The Court: I will permit the question.

Mr. Marshall: Goes to the credibility.

A. What it shows I don't know. When I came here I was quite a little girl with my mother. That would be in 1921, as far as I can remember.

Q. The records would show you four years older than you testified? A. I guess so.

Mr. Marshall: That is all.

Redirect Examination

By Mr. Kamo:

Q. Who is your father?

A. My father is a French Creole.

Q. What profession was he in?

A. He was in the army as a doctor.

Q. Your mother?

A. My mother Filipino-Spanish.

Q. Who was she working for in the Philippines?

A. She was working during World War I as a nurse.

Q. For the United States Army?

A. That's right.

Q. When you first came here how old were you?

A. Five to six years old.

Q. You came with your mother?

A. Yes. [53]

Q. Is it true your father died?

A. That I wouldn't know.

(Testimony of Mrs. Edna Rodrigues Alford.)

Q. When you came here what school did you go to?

A. I went to grammar school in Wahiawa, and I was in boarding school here in Honolulu at the Salvation Army.

Mr. Kamo: No further questions.

Mr. Marshall: The defendant wishes to take the stand.

WILLIAM LAFAYETTE ALFORD

defendant in the above-entitled cause, called as a witness for and on his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Marshall:

Q. What is your name?

A. My name is Lafayette Alford, Willie so-called.

Q. What is your age?

A. My age is thirty-eight.

Q. You are the defendant in this case?

A. I am the defendant in this case.

Q. You were married to the lady that just left the stand? A. I am married to her.

Q. Have you ever been married before?

A. Before, yes.

Q. How many times? A. Once.

Q. How many children do you have, if any? [54]

A. One boy on the war front in Korea.

(Testimony of William L. Alford.)

Q. That is the only child?

A. I have one more boy with my father.

Q. That is where? A. Oklahoma.

Q. Were you in the military service during the war? A. Yes, sir.

Q. Willie, have you ever been convicted of any offense of any nature of the laws of any place or state?

A. Never been convicted, except assault and battery once here in Honolulu.

Q. Prior to that? A. Before no more.

Q. When you were sixteen years old you were picked up by the truant officer?

A. I was convicted because I was guilty.

Q. When did you come to Honolulu?

A. 1945.

Q. You met your present wife about one year after that? A. About six months after.

Q. How do you feel toward your wife at this time?

A. I still love my wife. If I hadn't loved my wife I wouldn't have married her. I loved her, that is why I married her.

Q. During your marriage how did you and your wife get along, starting now from the first part, what was the situation?

A. We were just sweethearts, that's all, then we come to an agreement to get married. [55]

Q. Does she have any habits that you objected to, anything that ever caused any discussion?

A. Gambling.

(Testimony of William L. Alford.)

Q. Does she gamble very often?

A. That is her daily occupation, gambling every day.

Q. You have heard everything that has been said in this courtroom today concerning the charges against you? A. Yes.

Q. What do you have to say about the fact that your wife alleges that you induced her into prostitution?

A. I have never mentioned anything like that to my wife. Never received anything from her, not even a package of cigarettes. The whole year, last year, I was underneath the doctor's care, couldn't even walk when I came out. I was hurt in an accident in a car. I am still underneath the doctor's care.

Q. Let's go back to August 13, 1946, where were you living at that time, Willie?

A. 1130 Maunakea Street.

Q. Were you living there with your now wife?

A. Sometimes she come up and see me. We weren't living together because she hadn't divorced her husband.

Q. She wasn't staying there every night?

A. No.

Q. Did she ever stay there with you all night?

A. Part of the night, then she would leave.

Q. Where was she working?

A. No, she was gambling. At that time she quit her job. She didn't have a job long, she quit it. [56]

(Testimony of William L. Alford.)

Q. Did you ever mention the fact to her that you wanted her to earn money as a prostitute?

A. Never did.

Q. Willie, did you know what your wife's activities were?

A. Nothing but gambling. I didn't try to find out. People would tell me, but I wouldn't pay any attention. I loved the woman. I didn't want anyone to believe I couldn't get along with her.

Q. Did you ever threaten to strike her?

A. Never threatened to strike her, never struck her. She has always been free to do what she wanted. If I was cruel she could have reported me before that to the police.

Q. What did you think about your wife taking these trips to Hilo, and to the other islands?

A. I told her not to go, told her to stay home in Honolulu, not to stay away from home. She went and she stayed and came. She gambled day in and day out, she would gamble. I stayed by myself in the hotel. I have that proof.

Q. When were you married to your present wife? A. 1948.

Q. Do you remember the month?

A. December.

Q. December 23, 1948? A. Yes.

Q. When did she subsequently leave you, refuse to live with you any longer?

A. Never did. [57]

Q. didn't she leave you and refuse to live with you? A. Yes, that's right.

(Testimony of William L. Alford.)

Q. Tell the Court the occasion for her leaving, what happened, what brought that up, how did she happen to leave you when your marriage broke up?

A. She got tired of my telling her to stay home. She got tired my saying not to gamble. I have never squawked about anything; never called her names; never did beat her; never squawked about her gambling and staying away from home.

Q. When did she finally leave you?

A. April last year. I can't recall the date.

Q. April of 1950? A. That's right.

Q. Willie, I want you to explain to the Court exactly what your activities have been since you arrived in Honolulu in 1946, 1945 rather?

A. I have had a little business.

Q. Let's start off, you were discharged from the army for physical reasons in '43?

A. '43, because of my feet.

Q. You came to Honolulu in '45?

A. '45 I was a merchant seaman and the ship's crew broke up. They made us get off. I went to work. I got a job. While waiting for a job I got a job.

Q. Where did you work?

A. 121 Club, Hotel Street.

Q. What sort of place? [58]

A. Dance hall.

Q. What was your job?

A. Behind the counter.

Q. How long did you keep that job?

A. Until June, 1946, they closed up.

(Testimony of William L. Alford.)

Q. From June, 1946, what did you do the next year?

A. Scrabbling around different places. I had money when I got off my ship. When I got off my ship I got the money I made there. I saved that money. I stashed it away and opened a place of business the first part of 1947. I held on to my money. I opened a place of business. Operated that place of business about three months.

Q. Where was your place of business?

A. 1112 Maunakea. Shoe shine stand, amusement-like place, but my wife didn't hang around there. She stayed gambling. There wasn't any place for her over there.

Q. When you got out of that business what did you do?

A. I had saved enough money. I tried to get a job. Trying to get a job I would go to the employment office every few days. I couldn't do too much. I tried, made application at the Civil Service and every place.

Q. Did you have any savings at that time?

A. Sure I had savings.

Q. Did you invest your money?

A. I invested it in automobiles. I bought two automobiles. That was the only way I could save my money. I lived up until September in 1947, when I went to work at the Honolulu Airport as a Redcap, and I made money there, and I held on to that money. She knows that I used to [59] turn all the money over to her except just a few pennies.

(Testimony of William L. Alford.)

Q. You worked there until when?

A. October, 22nd of October.

Q. 1948? A. 1947.

Q. Then somewhere in there you joined the 52-20?

A. I joined the 52-20 because I am a veteran.

Q. When was that?

A. '48, I think May if I am not mistaken. I think it was in May. I can't recall if it was first in '48. I saved what little money I had to keep from going on Welfare.

Q. How did you live in 1949?

A. I squeezed through, and I had a friend I borrowed money from all the time.

Q. You are still living in this house that you and your wife were living in during your marriage?

A. No, we were living in a hotel at that time.

Q. When you say you squeezed through, you mean you were borrowing money from your friends?

A. I borrowed money from my friends. I used to let them have money when I was in business, they would come and borrow money from me. When I had no more finances then I mortgaged my car. That is where I lost my car.

Q. When was this incident that you are complaining of?

A. This year. January 13, 1951.

Q. How did you live in 1950?

A. I lived off my friends, mortgaged my automobile. That is why I lost it. [60]

(Testimony of William L. Alford.)

Q. Where are you staying?

A. I am staying with my friend. My tenant is living with me, and keeping the rent going.

Q. Do you have a job?

A. I had a job, but couldn't take it. Civil Service. I was just called to work.

Q. You have applications in at different places?

A. I have had applications in everywhere. I have been turned down because I am a colored man.

Q. You have been turned down?

A. Except Civil Service. That was the only place I could get any.

Q. Is there anything else you want to tell the Court about your case?

A. My case, I don't think my wife is right about bringing something up against me that I was guilty. If I was guilty I would have pleaded guilty to the Judge. I still love my wife and wanted to do the right thing. I always did the right thing, never squawked, never pushed her around.

Q. And the subject of prostitution never came up between you? A. Never came up.

Q. You testified that she never gave you as much as a package of cigarettes?

A. She never did. I was laid up and a friend of mine was taking care of me all last year. He carried me from the bed and carried me back and forth to the doctor.

Mr. Marshall: That is all. [61]

(Testimony of William L. Alford.)

Cross-Examination

By Mr. Kamo:

Q. Mr. Alford, when you came to Honolulu in 1945 how much money did you have with you?

A. I had around $3,500, because I just came off a trip.

Q. You had about $3,000?

A. About $3,500.

Q. During the years '45, '46, '47, '48, '49 and '50, approximately how much did you make each year? A. You mean during the year 19——

Q. Let's take the year 1946, in that whole year, according to your income tax return, how much money did you make, according to the income tax returns you filed, how much did you make?

A. I didn't file any because most of the money I had was from going to sea. In other words, we didn't have to pay for any.

Q. In 1947, you filed your income tax returns for the year 1946 did you not, or did you file any?

A. No, because I had no money by working on the job.

Q. Then in 1946 you hardly made any money at all?

A. 1946 I was working. I had a small job. I didn't make over $500.00.

Q. My question is, approximately how much did you make in the year 1946, whatever your employment was?

A. About $400.00, and the money I had when I came here.

(Testimony of William L. Alford.)

Q. Now in 1948 you must have filed an income tax return for the year 1947, how much did you make in the year 1947? A. '47? [62]

Q. Did you file an income tax return for that year?

A. Yes, but I paid that, my income taxes. I never got a notice to come in and file.

The Court: The Court will take a short recess at this time.

(Recess.)

Q. (By Mr. Kamo): Mr. Alford, how much money did you make in 1947?

A. '47, I can't recall how much I did make in '47.

Q. About how much?

A. Oh, I don't know, around $1,800.00, $1,900.00, about $2,000.00.

Q. How did you make this money?

A. I was working in my business.

Q. What kind of business?

A. Shoe shine parlor and amusement concession.

Q. And this was at 1112 Maunakea Street?

A. Yes.

Q. How long did you have this business?

A. About three months I think it was.

Q. You worked three months and earned $2,000?

A. A little over, between $2,000—between $2,500 and $2,000.

Q. You started at about $1,800 and you are going up and up, what is that last figure?

(Testimony of William L. Alford.)

A. That is about——

Q. $2,500.00? A. $2,500.00.

Q. For three months' work as a shoe shine stand? [63] A. Yes.

Q. You didn't work at all after that for the year 1947?

A. Yes, I worked at the Honolulu Airport in September of '47.

Q. How much did you make there?

A. Only getting $20.00 on salary and my tips, and my tips I don't know, I made good in my tips.

Q. What you earned at the shoe shine stand is included in that $2,500 figure you told me you earned in '48?

A. No, that was in my business, $2,500, in my business.

Q. The three months you were working at the airport how much did you earn, approximately?

A. I was only getting $20.00 a week and my tips.

Q. How much a month?

A. Around $100.00 a month, $200.00 with tips, because the tips was good out there at any time.

Q. In 1948 how much did you earn?

A. 1948 I got my 52-20.

Q. 52-20 how long?

A. I stayed until I finished it all.

Q. What time of the year did you finish with it?

A. 1949, I think I finished. My last check was the first of 1950.

Q. 1948, 1949, you were also in in 1950?

A. That's right, first of '49.

(Testimony of William L. Alford.)

Q. Ending part of '49, after you got all your 52-20, how did you live?

A. I was still squeezing through on the little money [64] I had stashed away.

Q. You weren't working?

A. Couldn't work, couldn't get a job anywhere. In 1948 I had a couple of days work at the employment office. That didn't amount to much.

Q. During the year 1950, that is last year, did you earn any money?

A. No, I didn't earn any money the first of last year. I still had a little money, and I mortgaged my car in the month of February.

Q. Since you came to Honolulu in 1945 up to and including today how many cars have you had?

A. Three.

Q. Three cars? A. Yes.

Q. When did you buy the first car?

A. The first two cars I bought in 1947.

Q. The first car in 1947? A. 1947.

Q. That was what kind of a car?

A. Buick.

Q. And the second car, when did you buy it?

A. '47.

Q. What kind of car was that? A. Buick.

Q. And the third car, when did you buy it?

A. 1949.

Q. What kind of a car was that?

A. Buick. [65]

Q. How many times have you been married?

A. Twice.

(Testimony of William L. Alford.)

Q. You were married the first time when?

A. 1932.

Q. Married in 1932, for how long?

A. Until 1937.

Q. How many children do you have?

A. Two, two boys.

Q. How old are they now?

A. My oldest boy is nineteen years old, the youngest one is seventeen.

Q. Do you have any other children besides those two? A. No.

Q. Up to the time this case came up and your wife had testified and said she was a prostitute, or practicing prostitution, did you know that she was in the game of prostitution?

A. I didn't know. All I know was my wife gambled. That is all I know.

Q. Did you know that your wife was arrested and plead guilty to prostitution, for prostitution?

A. No, the only time I knew——

Q. When was that? A. 1947.

Q. Then your statement that you didn't know she was practicing prostitution up until a few months ago was not true?

A. I didn't know she was practicing prostitution until [66] the year she was busted the first time in 1947. Then I knew she had been fooling around.

Q. Then in 1947 you knew she was a prostitute?

A. That's right.

Q. Then your statement that you did not know

(Testimony of William L. Alford.)

she was a prostitute until a few months ago is not correct?

A. I did know she was a prostitute in 1947. I didn't know before because she always said she was gambling. She would go out and I never squawked.

Q. In 1947 you knew she was a prostitute, is that right?

A. I knew she had been arrested for prostitution. She wasn't supposed to be no prostitute, she was supposed to have been gambling. She wasn't supposed to be doing any prostitute work.

Q. Did you ever receive any money from your wife?

A. I never received anything from my wife.

Q. Did you ever receive any clothing, or anything, from your wife?

A. No, I never received any clothing from my wife. I bought my own clothing out of my own earnings.

Q. Did you buy the food for yourself and your wife? A. That's right.

Q. And any time you went out you paid for both yourself and your wife?

A. That's right.

Q. Did you pick up your wife at the airport at any time when she came back from the other islands? A. I did.

Q. Did you ever take your wife to the [67] airport?

A. I have taken my wife to the airport when

(Testimony of William L. Alford.)

she went to see her daughter get married in 1949, on Kauai.

Q. That was the only time?

A. That was the only time.

Q. On September 23rd of 1950 were you at the airport?

A. I went to pick her up at the airport.

Q. Then that time she went to Kauai was not the only time you went to the airport to pick her up?

A. That was the only time I went to pick her up, August, 1949, her daughter got married. I took Edna to the airport. When she got into trouble I said I would go to meet her. The bondsman sent the money to get her out of jail. I asked him if he would put up the money. He said, "don't beat your wife," and I said I had never beat my wife.

Q. You were at the airport in September to meet your wife when she came back from Hilo, after she had been in jail in Hilo?

A. Yes, in September, I don't know what day it was.

Q. A police officer was there, do you recall that?

A. Yes, I met her. I talked to her. I asked her where the bag was. The baggage boy sent the bag out. The airport was full. I didn't want to leave her bag. I was talking to my wife. It is my right to talk to my wife. She is my legal wife. I think it was right to talk to her.

Q. Didn't your wife tell you not to take the suitcase?

(Testimony of William L. Alford.)

A. It was my suitcase. She didn't tell me not to take it. [68]

Q. Did you return the suitcase to your wife the next day? A. The next day.

Q. You returned it to where her son is now?

A. That's right.

Q. Did you open the suitcase?

A. Yes, I opened it because it was mine. We both had keys to it.

Q. Why did you open it, Mr. Alford?

A. Because she was my wife. I had bought the bag and bought her clothes.

Q. The bag was there with you, you had the bag? A. Yes, I had the bag at my house.

Q. Why did you have to open it?

A. Because the police told me to get the bags. I told him it was my bag and my wife. I asked the police to open it. I didn't ask my wife to open it.

Q. Why did you open the bag with your key?

A. I opened it with my key because it was my bag. I figured it was mine. I think she had been keeping everything hidden from me. I wanted to see what was in it.

Q. You suspected she was keeping something from you, and you wanted to get at that?

A. yes.

Q. You got it?

A. No, I got some things to show evidence where she was in jail and the man who called me was her boy friend. [69]

(Testimony of William L. Alford.)

Q. That was in the note book?

A. I didn't see that note book. I haven't seen that note book.

Q. Where was that evidence you saw?

A. On a letter.

Q. You disposed of that letter?

A. No, I didn't wreck the letter.

Q. You threw the letter away?

A. No, I didn't wreck it; I kept it, and some pictures that was with the man that came from Hilo with her. He is running around with my wife.

Q. Do you recall destroying some letters?

A. I never destroyed some letters.

Q. Before the incident at the airport?

A. I never destroyed any letters.

Q. Do you recall saying to your wife that these things must be destroyed because we might be raided? A. I don't recall I ever said that.

Q. Who is living at your home now?

A. A lady by the name of Ruth Mason.

Q. And who else?

A. A gentleman by the name of Young.

Q. And yourself? A. And myself.

Q. Is that all? A. That's all.

Q. What is it; an apartment or hotel?

A. Cottage. [70]

Q. Who is Ruth Mason?

A. She is that guy's lady friend.

Q. Does she stay with you?

A. No, she don't stay with me.

(Testimony of William L. Alford.)

Q. How long have Ruth Mason and Mr. Young been with you?

A. She moved there last November, I think it was last November.

Q. While Mrs. Alford was on the other islands two or three months did you stay home alone?

A. I stayed home alone.

Q. You never did have anyone there with you?

A. No one except one man who was with me when I was sick.

Q. While Mrs. Alford was home on the Island of Oahu did you at any time have a girl, or a woman, live in the house with you and Mrs. Alford at the same time? A. No.

Q. There was never a girl in the house?

A. There was never a girl in the house.

Q. Did you and your wife ever have any visitors in your house? A. Never did.

Q. And she didn't have a visitor? A. No.

Q. And you didn't have a visitor?

A. No, I didn't.

Q. Did you have any male friends visit you and your wife? A. No. [71]

Q. As long as you and your wife were living together?

A. No one comes because we never was home half the time. I was on the street and she was at Iwilei gambling. That is where she was gambling.

Q. How do you know she was gambling?

A. I see her sitting up at the poker table.

Q. Whose home is that?

(Testimony of William L. Alford.)

A. That is where she lived.

Q. Where she lives now?

A. Right where she lives. They gamble day in and day out.

Q. Do you know of any reason why your wife should perjure herself, as you have said, and testify against you now?

A. I don't have any reason what would make her lie like that. I never give her cause. I never bothered with her anything like what she said.

Q. Are you familiar with an address on Halai Street in Hilo?

A. No, I don't know any streets in Hilo.

Q. Do you know a man by the name of Bonifacio Bongolon? A. No, I don't know him.

Q. Did you write any letters to Hilo at any time? A. No, I didn't.

Q. Did you receive any letters from Hilo at any time. A. No.

Q. Did you receive any special delivery letters from Hilo at any time?

A. I don't have any special delivery letters to show [72] you that I received.

Q. Did you go to Hilo at any time?

A. I went to Hilo looking for my wife.

Q. When was that? A. In August.

Q. What year? A. 1950.

Q. 1950? A. That's right.

Q. Why did you go?

A. I went there to get my wife, to bring her

(Testimony of William L. Alford.)

home, and I found her in trouble at the hotel I went to.

Q. How did you know she was in Hilo?

A. I was told she was in Hilo.

Q. Who told you?

A. She had called to my home. She had run away and called back and said she was in Hilo.

Q. Was this a telephone call? A. Yes.

Q. When was this phone call made?

A. In August after she had run away.

Q. When did she run away?

A. She left me on the 14th of August. I was standing in my door, I couldn't walk when she left me.

Q. August of what year? A. 1950.

Q. Before that had you been to Hilo?

A. I was in Hilo in 1948.

Q. '48? [73] A. Yes.

Q. Your wife was there with you?

A. She was already over there. I talked to her.

Q. Where did you meet your wife when you went to Hilo?

A. I talked to my wife there. I talked to her.

Q. Where was "there"?

A. At the Mamo Theatre.

Q. Did you just talk in front of the theatre and nowhere else? A. That's all.

Q. You never met a party by the name of Bonifacio Bongolon?

A. Never met a party by the name of Bonifacio Bongolon.

(Testimony of William L. Alford.)

Mr. Kamo: Bring Bonogolon in to the door, please.

(Whereupon the Bailiff brought Bonifacio Bongolon to the door of the courtroom.)

Mr. Kamo: What is your name?

Mr. Bonogolon: Bonifacio Bongolon.

Q. Mr. Alford, have you ever seen this man before (indicating Bonifacio Bongolon)?

A. I have seen him before, I didn't know his name.

(Whereupon Bonifacio Bongolon left the courtroom.)

Q. You saw him in Hilo? A. That's right.

Mr. Kamo: No further questions.

Redirect Examination

By Mr. Marshall:

Q. Willie, this shop you had on Maunakea Street, that you had for three months, describe the nature of that a little more. [74]

A. Amusement concession, shoeshine.

Q. What kind of amusement concession?

A. Pinball, shoeshine parlor, juke boxes.

Q. How many pinball machines did you have?

A. Three.

Q. Did most of your profits come from the pinball machines? A. Shoe shine and juke boxes.

Q. You had juke boxes, pinball machines and shoe shine? A. Yes.

Q. How did you happen to lose that place?

(Testimony of William L. Alford.)

A. They went up on the rent. I first got the place, repaired it, built it up, then I sold cigarettes and different candy bars, shoe polish.

Q. And the money came from the pinball machines? A. My earnings of the shoe shine.

Mr. Marshall: No further questions.

Recross-Examination

By Mr. Kamo:

Q. From 1945 to 1950 have you ever made any income tax returns, or filed any income tax returns?

A. No.

Mr. Kamo: No further questions.

Q. (By the Court): How many shoe shine boys did you have at your parlor?

A. Just two, two guys used to work around there shining shoes, working, they weren't being paid a salary.

Q. They were working on a percentage basis?

A. They would just work and get a few pennies and take [75] off. I had to stay at my place and shine shoes myself. I used to do the same thing myself, work in a guy's place shining shoes after I closed up.

Q. You were making $800.00 a month on this amusement concession and shoe shine parlor?

A. Yes, something like that, sir.

Q. How much was your rent when you started out?

A. $100.00 then the landlord wanted to raise the

(Testimony of William L. Alford.)

rent to $250.00. After he found I was a colored boy he wanted me to give the place up.

Q. Who was the landlord?

A. L. S. Long, owns the Chisolm (?) Grill.

Q. You said you had three Buicks?

A. Yes, I bought them on investment. I mortgaged one, I let the bank hold one to buy another, trying to make money. That was the only way I could hold on to my money.

Q. The first Buick you bought, what model was that? A. 1941.

Q. The second? A. 1941.

Q. The third? A. 1948.

Q. What were you doing with these cars, driving around in them?

A. I would ride in them. I sold them.

Q. But you had a car all the time since 1947 then? A. Up to 1949.

Q. You bought another one in 1949?

A. Yes. [76]

Q. That was the year you were squeezing through?

A. Because of holding on to my money I had stashed away.

The Court: I have no further questions. Any questions upon the Court's examination?

Mr. Kamo: Yes, your Honor.

Recross-Examination

By Mr. Kamo:

Q. How did you get the shoe shine business?

(Testimony of William L. Alford.)

A. I built it up from a shoe box. It was an old fence. I took it and built it up.

Q. Did you have to buy the business from somebody? A. No.

Q. You rented it from somebody?

A. No, I made it by myself.

Q. You rented the place?

A. I rented the space and I made the equipment myself.

Q. How much rent did you pay?

A. $100.00, and he raised the rent. He said he wanted me to pay $150.00 or either move out. That was his excuse to get me out of the place.

Mr. Kamo: No further questions.

The Court: Any further questions, Mr Marshall?

Mr. Marshall: No questions. We rest, your Honor.

The Court: Any rebuttal, Mr. Kamo?

Mr. Kamo: Yes, your Honor. Call Bongolon.

BONIFACIO BONGOLON

called as a witness, in rebuttal, for and on behalf of the [77] Territory, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kamo:

Q. Your name is Bonifacio Bongolon?

A. Yes, sir.

Q. You are an inmate of Oahu Prison at the present time? A. Yes.

(Testimony of Bonofacio Bongolon.)

Q. Do you understand English?

A. Not so good.

Q. Do you understand what I am saying?

A. I understand a little bit.

Q. If you don't understand you let me know. You know Edna Rodrigues, also known as Edna Alford? A. Yes.

Q. You used to live in Hilo? A. Yes.

Q. What address? A. Me?

Q. Yes. A. Wainaku Avenue.

Q. Wainaku Plantation? A. Yes.

Q. You know the name of the street?

A. I don't know the name already.

Q. Palani?

A. No, not Palani, Wainaku Street, because it was there.

Q. Do you recall ever driving Mrs. Alford to the post [78] office?

A. Oh, sometimes I drive. I send the money two times. Two times I know because I have full load, sometimes I get a passenger go some place because I drive taxi.

The Court: Let's get this through the Interpreter. I don't understand it all.

(Whereupon Mr. Alfredo Ocampo, Official Filipino Interpreter, acted as official interpreter.)

Q. Will you ask him what his occupation was in Hilo? A. Taxi driver, as a taxi driver.

Q. As an operator of a taxi did you at any time, while in Hilo, drive Mrs. Edna Alford?

(Testimony of Bonofacio Bongolon.)

A. Yes, I did.

Q. Where, if any place, do you remember driving her to? A. Papaaloa, Honokaa.

Q. Do you recall ever driving her to a post office?

A. Yes, she went to send the money to the husband, Willie Alford.

Q. What was that?

A. She wants to send the money to the husband.

Q. How often was this?

A. All depends, sometimes two times one week, sometimes one time one week, because she was telling me she was sending the money because——

Mr. Marshall: I object to this as hearsay.

The Court: Yes, the objection will be sustained.

Q. What year was this? A. 1950.

Q. Did you at any time see any mail at your place for [79] Mrs. Alford?

A. Sometimes I see the letter, sometimes I no see, because I not home all the time.

Mr. Kamo: No further questions.

Cross-Examination

By Mr. Marshall:

Q. Mr. Bongolon, these letters you testified you sometimes saw at your house that Mrs. Alford received from Mr. Alford?

A. Yes, from him, when she sent money he answered the letter.

Q. How do you know the letters were from Mr.

(Testimony of Bonofacio Bongolon.)

Alford? A. She said she received a letter.

Mr. Marshall: I object, and ask that the answer be stricken.

Mr. Kamo: Mr. Marshall asked for the answer. I see no reason why the answer should be stricken.

Mr. Marshall: It was hearsay.

The Court: You asked the question how he knew the letters came from him and he gave you the answer.

Q. Mr. Bongolon, isn't it a fact you used to solicit for Mrs. Alford when she was in Hilo?

A. Yes, I was the one taking care of her. She asked me to help her. She is my godsister.

Q. You used to solicit for her, get men for her?

A. Yes, because she wanted to make money.

Mr. Marshall: No further questions. [80]

Mr. Kamo: That is the case for the Government, your Honor.

The Court: Thank you, Mr. Bongolon, you may be excused.

(The witness was excused.)

The Court: Does counsel wish to argue this case?

Mr. Kamo: Yes, briefly, your Honor.

(Argument by Mr. Kamo.)

(Argument by Mr. Marshall.)

The Court: Well, as you have pointed out, Mr. Marshall, the sole test in this case is the credibility of the witnesses for the Government as weighed

against the credibility of the testimony of the defendant.

Starting out with the defendant, it is most incredible to me that he knew nothing at all about the activities of his wife as a prostitute, and tried to tell this Court that all his wife ever did, except for that one conviction in 1947, was to go out and gamble. He absolutely denied ever receiving any money from her, ever receiving any letters from her, or ever writing to her, and in that connection the testimony of the last witness for the Government was extremely important. In other words, if Alford would lie about that situation he is likely not to tell the truth about other trifles. Another thing, if Mrs. Alford was over in Hilo making so much money and keeping it all to herself and not sending it to her husband, as she said she did, it is quite unlikely she would have had to stay in the Hilo jail [81] because she could not pay a fine of $150.00.

I cannot believe the defendant's story that he never took Mrs. Alford to the airport, or met her at the airport, except on the two occasions mentioned by him, once when she went to Kauai for her daughter's marriage, and the last time when she returned in September, 1950. The defendant had nothing else to do most of the time, and the least he could have done was to meet his wife on such occasion. He was driving around in a 1949 or 1948 Buick automobile, which is a very nice kind of a car for a 52-20 alumnus to be driving,

though he says he made some little money in 1949 and 1950.

Then we go into the question of the testimony of Mrs. Alford. I do not care who the woman is, or what her background is, but when she comes into court voluntarily, as Mrs. Alford did in this case, and bares her soul to the public in connection with matters of this type, I think she has thought it over very carefully, and my impression from her testifying on the witness stand was that she was not motivated by malice toward the defendant to the extent where she would perjure herself. She is too intelligent a person, to my mind, to do that sort of thing.

I think the evidence clearly shows, and beyond any doubt in my mind, that this defendant did induce, compel and procure Edna Rodrigues Alford to hold herself out as a prostitute, and to practice prostitution, with the idea in his mind, Alford's mind, that he was going to get a portion of the ill-gotten gains earned by her. [82]

I further find that the testimony of the principal witness for the Government sustained the allegations in all five counts contained in the Indictment, and I find the defendant is guilty as charged as to each count.

Mr. Marshall: May we except to the verdict, because the evidence does not show the defendant guilty beyond a reasonable doubt.

The Court: Yes, Mr. Marshall. Mr. Alford, you will be referred to the Adult Probation Officer for pre-sentence investigation and report, and the mat-

ter of sentence in your case will be continued until Friday, May 25th, 1951, at 1:30 p.m. Anything further?

Mr. Marshall: Just for the record, your Honor, we hereby give notice of motion for a new trial at this time.

The Court: Very well. Anything further, Mr. Clerk?

The Clerk: No, your Honor.

The Court: The Court will recess then.

(Whereupon Court adjourned.) [83]

Friday, May 25, 1951, 1:30 P.M.

(The Clerk called the case.)

The Court: Mr. Marshall, have you anything to say on behalf of the defendant?

Mr. Marshall: Your Honor, in this particular case, possibly it is a little different than most matters that come before the Court. The Court has heard the complaining witness in this case testify that before her marriage to this defendant, even earlier too, she practiced prostitution, and continued practicing prostitution after her marriage to this defendant. This man is nearly 37 years old. He has no record of any kind, no previous record, no record of arrest even for investigation, in so far as the Police Department is concerned, up to this incident. He has managed to behave himself. This woman, the complainant, is a self-confessed prostitute, that was her means of livelihood. I am asking the Court to consider giving the defendant proba-

tion in this case conditioned upon Willie Alford being out of this Territory within seven days.

The Court: Mr. Marshall, I appreciate [84] what you have to say in this case, and I have given a good deal of thought to it, as a matter of fact. As Mr. Symonds pointed out a while ago I guess we are always going to have prostitution, but that is no justification for procuring and pimping. I take a very dim view of anyone who earns his livelihood as a result of prostitution in the manner in which Willie Alford made his living, and contrary to what you have to say about the complaining witness in this case, I was considerably impressed in many ways. There is no question she did act as a prostitute. I was considerably impressed with her background.

It might as well be known as far as procurers and pimps are concerned in this Court, that they cannot carry on their trade and then get caught and then be given an opportunity to go back to the mainland of the United States.

The matters that you have taken up with the Court may be considered in connection with the Board of Paroles and Pardons if Mr. Alford is desirous of leaving the Territory after the service of his sentence. That will be entirely up to him.

It is the judgment and sentence of the Court that the defendant, William Lafayette Alford, as to the first count in the Indictment in this case, that he be confined at Oahu Prison at hard labor for a period of five years. The same sentence will be given in the second, third, fourth and fifth counts of the

Indictment, the sentence as to each count to run concurrently. [85]

Mr. Marshall: We wish to note an exception to the verdict and to the sentence of the Court, as being contrary to the law and to the evidence, and to the weight of the evidence, and note an appeal to the Supreme Court.

The Court: The exception will be noted.

I Hereby Certify that the foregoing, pages 3 to 84, both inclusive, is a true and correct transcript of my shorthand notes taken in the above-entitled cause before Honorable Jon Wiig, Fifth Judge, Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Honolulu, T. H., on Wednesday, April 25th, 1951, and Friday, May 25th, 1951.

/s/ ANNE R. WHITMORE,
Official Court Reporter.

[Title of Supreme Court and Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the supreme court, Territory of Hawaii, do hereby certify that the documents and items listed in the index to the certified transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause are true and correct copies of originals on file in said cause and the above court, and certified copies of originals on file in said court and cause. I further certify

that all documents and items listed in said index are attached hereto.

I further certify that all costs of said record on appeal have been paid by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the above court this 26th day of August, 1952.

[Seal] /s/ LEOTI V. KRONE,
Clerk.

[Endorsed]: No. 13,519. United States Court of Appeals for the Ninth Circuit. William Lafayette Alford, Appellant, vs. Territory of Hawaii, Appellee. Transcript of Record. Appeal from the Supreme Court, Territory of Hawaii.

Filed August 28, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13519

TERRITORY OF HAWAII,
Defendant in Error,

vs.

WILLIAM LAFAYETTE ALFORD,
Appellant Herein and
Defendant-Plaintiff in Error.

STATEMENT OF POINTS RELIED UPON AND DESIGNATION OF RECORD

Comes now, William Lafayette Alford, appellant herein, by his attorney, Thomas P. Gill, and hereby adopts his assignments of error appearing in the transcript of the record as the points upon which he intends to rely on appeal, and designates the entire transcript on appeal as set forth in the Praecipe filed with the Clerk of the Supreme Court of the Territory of Hawaii on this date for printing.

Dated: At Honolulu, T. H., this 18th day of July, 1952.

WILLIAM LAFAYETTE
ALFORD,

By /s/ THOMAS P. GILL,
His Attorney.

[Endorsed]: Filed August 28, 1952.

No. 13,519

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM LAFAYETTE ALFORD,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Upon Appeal from the Supreme Court of the Territory of Hawaii

TERRITORY'S ANSWERING BRIEF

ROBERT E. ST. SURE, ESQ.
Public Prosecutor, and
JAMES H. KAMO, ESQ.
Assistant Public Prosecutor
of the City and County of Honolulu,
Attorneys for Appellee.

INDEX OF CONTENTS

TABLE OF AUTHORITIES

No. 13,519

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM LAFAYETTE ALFORD,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

TERRITORY'S ANSWERING BRIEF

STATEMENT OF FACTS

In order to present a more complete statement of the factual situation upon which the trial court found appellant guilty of procuring, the Territory of Hawaii offers an amplification of the appellant's statement of facts.

There is substantial evidence within the periods charged in the indictment that appellant did induce, compel and procure Mrs. Alford to practice prostitution. The appellant made arrangements for flights to the other islands for Mrs. Alford when she went to the other islands to practice prostitution. He would pick up the tickets and take her to and from the airport (Tr. pp. 59-60). The appellant further directed

Mrs. Alford in the manner in which her earnings from prostitution were to be mailed to appellant. He directed her to fold the money in half and place it in an envelope and send it special delivery (Tr. p. 57). The appellant started Mrs. Alford in the practice of prostitution and kept her as a prostitute by taking her as his wife (Tr. pp. 70, 72). He encouraged her in the act of prostitution even after their marriage (Tr. pp. 54-55). He demanded from Mrs. Alford all the money she earned as a prostitute (Tr. pp. 53, 54, 57, 60, 74, 75).

The appellant had another woman besides Mrs. Alford practicing as a prostitute from the same house in which Mrs. Alford lived (Tr. p. 70). Prior to the marriage of Mrs. Alford to appellant, he persuaded her into prostitution by promises and threats, by making arrangements for acts of prostitution, and in one instance by manhandling her.

SUMMARY OF ARGUMENT

I.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding and Finding That There Was Sufficient Evidence to Sustain an Essential Element of the Charges Contained in the Indictment, Namely, That Appellant Did Induce, Compel and Procure A Certain Female Named Edna Rodrigues Alford to Practice Prostitution During the Various Times Set Forth in the Indictment.

This appeal involves the question of whether the Supreme Court of the Territory of Hawaii erred in holding and finding that there was sufficient evidence to sustain a conviction of the appellant, William Lafayette Alford.

A. THIS CASE DOES NOT INVOLVE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

There is no question that the constitutional guaranties of the Federal Bill of Rights are applicable to the Territory of Hawaii including the due process clause of the Fifth Amendment (Appellant's Brief, p. 7).

In *Buchalter v. New York,* 319 U. S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1942), the Supreme Court of the United States defines "due process" and the law applicable herein at pages 1495-1496:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. But the Amendment does not draw to itself the provisions of state constitutions or state laws. *It leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court.*" (Emphasis ours.)

In *Frank v. Mangum,* 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969, the court states at pages 979-980:

> "As to the 'due process of law' that is required by the 14th Amendment, it is perfectly well settled

> that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. (citing authorities)"

Again the court states in reference to "due process," at page 983:

> ". . . This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases."

In like manner, the Fifth Amendment holds the same in respect to the administration of the criminal laws of the Territory of Hawaii. See *Palakiko v. Territory of Hawaii,* 188 F. 2d 54, 60; *Young v. Territory of Hawaii,* 160 F. 2d 289, 290; *Fukunaga v. Territory of Hawaii,* 33 F. 2d 396, 397.

The test of due process is that a standard of fundamental fairness is required and whether that standard is complied with. *(Palakiko v. Territory of Hawaii, supra,* p. 60.)

This honorable court in *Palakiko v. Territory of Hawaii, supra,* at page 60, said:

> "We must note that our jurisdiction to review the action of the Hawaiian courts in holding the confessions admissible is a narrow one . . . We are not empowered to say what those local rules of evidence in Hawaii should be . . . (citing authorities)."

In Pioneer Mill Co. v. Victoria Ward, 158 F. 2d 122, 125 (1946), this honorable court said:

> ". . . Our power to reverse rulings of the territorial court on law or fact is limited to cases of manifest error, Waialua Agr. Co. v. Christian, 305 U. S. 91, 109, 59 S. Ct. 21, 83 L. Ed. 60."

In the case at bar, the Supreme Court of the Territory of Hawaii did not err in such a way as to give this honorable court jurisdiction as the Supreme Court of Hawaii found from the record ample evidence to sustain the verdict of the trial court that the appellant did induce, compel or procure Edna Rodrigues Alford to become a prostitute or hold herself out as a prostitute.

B. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN AN ESSENTIAL ELEMENT OF THE CHARGE, NAMELY, THAT APPELLANT DID INDUCE, COMPEL OR PROCURE EDNA RODRIGUES ALFORD TO PRACTICE PROSTITUTION AND HOLD HERSELF OUT AS A PROSTITUTE.

The appellant specifies as error that the verdict is contrary to law in that there is no evidence that the appellant did induce, compel or procure Edna Rodrigues Alford to practice prostitution or to hold herself out as a prostitute.

Appellant cites *Cole v. Arkansas,* 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644, 645 (1948), as authority for the jurisdiction of this court to reverse the ruling of the Supreme Court of the Territory of Hawaii. In this case the information charged, and the evidence showed, a violation of Section 1 of the Penal Laws of the state, but at the trial the language and the construction placed upon it showed that it was intended to charge an offense under Section 2 of such law. Furthermore, the instructions by the trial judge to the jury were based on Section 2 of the Penal Law.

Appellee respectfully submits that the *Cole v. Arkansas* case is of little value as authority because the factual situation in the case cited is not parallel to the case at bar.

In the case at bar, there is considerable evidence from which the lower court could find the verdicts as it did. It is sufficient to state that the lower court believed the testimony of Edna Rodrigues Alford and the other witnesses for the government rather than that of the appellant when it brought verdicts of guilty against the appellant in all five counts of the indictment (Tr. pp. 114, 115, 116).

An examination of the trial transcript would indicate an abundance of evidence to be considered by the trial court. Testimony adduced during the trial of the case was of the following nature:

(As to "induced") That the appellant would give her nice clothes, a home, car, jewelry, things of that nature (Tr. pp. 53, 54).

(As to "compelled") The complaining witness testified as to threats directed at her by the appellant (Tr. pp. 51, 73); that the appellant manhandled her in one instance (Tr. p. 54).

(As to "procured") That the appellant purchased the tickets for her flights to the other islands where she went for the purpose of prostitution (Tr. pp. 59-60); that he drove her to and from the airport from where she left for the other islands to practice prostitution (Tr. pp. 60-61). Complaining witness further testified that after her marriage to the appellant, he encouraged her to continue practicing prostitution (Tr. pp. 54-55); that appellant directed her as to the mode in which she should send the money earned by her in prostitution to him (Tr. p. 57); and that appellant married her for the purpose of keeping her as a prostitute (Tr. pp. 70, 72).

It is the general rule that the appellate court will not reverse a verdict on error where the record shows that it was based on the credibility of witnesses or the weight of evidence. See *Hang Fook v. Rep. of Haw.*, 9 Haw. 593; *Territory v. Burum*, 34 Haw. 75, 76; *Territory v. Pai-a*, 34 Haw. 722, 728; *In re Oxiles*, 29 Haw. 323, 328; 3 *Am. Jur., Appeal & Error*, Secs. 887, 888, 889, pp. 441-451.

The statute of the Territory of Hawaii relating to writs of error expressly declares *that there shall not be a reversal for any finding depending on credibility of witnesses or the weight of evidence.* (Section 9564, *Revised Laws of Hawaii* 1945).

The trial judge is in a better position to weigh and ascertain what testimony to believe and what should be discarded as unworthy of belief.

In concluding this contention, appellee urges that there is clearly no merit to the appellant's contention that there was no evidence to sustain the allegation of the indictment.

II.

The Supreme Court of the Territory of Hawaii Did Not Err in Upholding the Conviction of the Appellant on the Ground That There Was Evidence to Sustain the Charges Contained in the Indictment. The Trial Court Did Find That the Defendant Did Induce, Compel and Procure Edna Rodrigues Alford to Practice Prostitution and to Hold Herself Out as a Prostitute and Not for an Offense for Which She Was Not Charged, Namely, That He Knowingly Received Money Without Consideration From a Woman Engaged in Prostitution.

A. THE QUESTION OF VARIANCE FROM THE CHARGE CANNOT BE RAISED FOR THE FIRST TIME IN THIS COURT.

No question of variance from the charge was raised or called to the attention of the trial court and ruled upon, nor has any failure to rule been preserved by proper exceptions in the trial court or the Supreme Court of the Territory of Hawaii. The question of variance not having been decided and ruled upon by the Supreme Court of the Territory of Hawaii cannot be raised for the first time in this court.

B. APPELLANT WAS NOT DENIED DUE PROCESS OF LAW IN THAT EVIDENCE WAS RECEIVED AND HE WAS CONVICTED AS CHARGED.

Assuming that the question of variance may be raised in this court for the first time, it is the appellee's contention that there was no variance of the evidence from the charge.

In the case at bar, although the prosecuting attorney may have been in error at the inception of the case as noted by his opening statement (Tr. p. 39), the trial court was not misled by the statement made by the prosecuting attorney and it did try and find the appellant guilty as charged. Before proceeding with the trial, the court stated in part as follows:

> ". . . My idea is that the offense consists of inducing, compelling or procuring a person to act as a prostitute, to practice prostitution, and thereby to obtain and secure from her a portion of the gains earned by her during the times alleged in the indictment. I do not feel that under this statute the defendant has to beat up a person in order to make her practice prostitution, or to exercise or to compel by force, or use of drugs, or some such thing. I may be wrong, but it is my understanding of the statute that it is the inducing, compelling or procuring, or any of them, whereby the procurer or the pimp obtains a portion of the ill-gotten proceeds." (Tr. p. 43)

In finding the appellant guilty of the charges against him, the court made the following statement:

> "I think the evidence clearly shows, and beyond any doubt in my mind, that this defendant did induce, compel and procure Edna Rodrigues Alford to hold herself out as a prostitute, and to practice prostitution, with the idea in his mind, Alford's mind, that he was going to get a portion of the ill-gotten gains earned by her.
>
> I further find that the testimony of the principal witness for the Government sustained the allegations in all five counts contained in the Indictment, and

I find the defendant is guilty as charged as to each count." (Tr. p. 116)

As it has been pointed out in Summary of Argument No. I of the Territory's Answering Brief, there is substantial evidence to uphold the conviction of the appellant as he was charged. An examination of the transcript of the proceedings in the trial court shows that the evidence received did not merely prove that the appellant knowingly received money without consideration from a woman engaged in prostitution, but goes further and sustains a conviction of the appellant as he was charged. Assuming that there was some variance, it was not such as to affect the substantial rights of the appellant. It did not deprive the appellant of his rights to be protected against another prosecution for the same offense nor did it mislead him.

We respectfully submit that the cases cited by the appellant are of little value as authority because the factual situations were different from the case at bar. In the instant case the trial court found that the evidence presented was sufficient to convict the appellant as he was charged and not for any other offense.

III.

The Supreme Court of the Territory of Hawaii Did Not Err in Upholding the Conviction of the Appellant Based on the Testimony of the Appellant's Wife as to Events Occurring Before and During Marriage.

A. EDNA RODRIGUES ALFORD WAS A COMPETENT WITNESS AGAINST HER HUSBAND IN THE CASE AT BAR AND THE ADMISSION OF HER TESTIMONY WAS PROPER.

The appellant contends that the rule at common-law is that a wife is not competent to testify against

her husband unless the crime charged is an offense against the person of the wife, and, that the Hawaiian statute is a codification of the common-law, and, therefore, should be strictly construed in accordance with common-law principles. The appellant further contends that the offense alleged to have been committed in these proceedings is not an offense against the person of the spouse testifying, and, therefore, Edna Rodrigues Alford is not a competent witness against her husband under Section 9838, *Revised Laws of Hawaii* 1945.

Section 9838, *supra,* reads as follows:

> "In criminal cases. Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offense, or any offense punishable on summary conviction, compellable to give evidence for or against himself; or, except as hereinafter mentioned, shall render any person compellable to answer any question tending to criminate himself, or shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, or any wife competent or compellable to give evidence against her husband, except in such cases where such evidence may now be given and in such cases in which the accused is charged with the commission of an offense against the person of his wife or of her husband, as the case may be; provided also that in all criminal proceedings the husband or wife of the party accused shall be a competent witness for the defense."

It is here contended that where a husband is charged under Section 11676, Act 26, *Session Laws of Hawaii*

1949, of inducing, compelling and procuring his wife to practice prostitution, with intent in him thereby to obtain and secure from the wife a portion of the gains earned by her in such practice of prostitution, the offense is one that is against the person of the wife, and she is competent to testify against her husband where he is on trial for that offense.

In *Denning v. United States,* 247 Fed. 463, defendant was charged with having persuaded his wife to go from one state to another for the purpose of prostitution in violation of the Mann Act, 18 U. S. C. A., Section 2421 et seq. His conviction was based upon the testimony of his wife, and the question upon appeal was whether the wife was a competent witness. The United States Circuit Court of Appeals in holding that the wife was a competent witness in such a case said as follows:

> "It must be held that it is within the reason of the common-law exception to the rule of incompetency to permit the wife to testify against the husband when the commission of the offense charged against the latter is an act directed against the person of the former. It cannot be that the common-law would protect the wife against a single act of violence, and not against a system of assaults; against an act that brought merely mortification and shame, and not against a series of acts which brought degradation and destruction of body and soul; against a single essay at crime, and not against a continuing effort at pre-eminence in infamy.
>
> "The offense cannot be classed with those which merely offend the marital relation. It operates im-

mediately and directly upon the wife. It is an offense against the wife. A primary purpose of the Mann Act was to protect women who were weak from men who were bad. Its protection was not confined to unmarried women. Its punishment was not intended to be limited to unmarried men. Men led by cupidity to the base crime have utilized marriage in the accomplishment of their ends. They should not be permitted to use marriage to prevent their punishment. They should not be permitted to invoke a sacred institution, and the rules established for its protection, to secure immunity from punishment for the most infamous crime that could be devised for its degradation." (*Denning v. United States, supra,* at p. 465.)

In *Cohen v. United States,* 214 Fed. 23, defendant was charged for bringing his wife from one state to another with intent that she should practice prostitution. The Circuit Court of Appeals in holding that the wife was a competent witness in such a proceeding against her husband, stated as follows:

"At common law the husband and wife were each under total disability to testify for the other, but the disability did not extend to the testimony of one against the other. Such testimony of the one against the other was excluded, however, unless both the husband and wife waived the privilege and consented to its admission . . . But the common law made an exception to the rule of privilege in cases where the husband or wife was called as a witness to testify as to personal wrong or injury sustained from the other . . .

We are of the opinion that the personal injury to a wife which permits the admission of her testi-

mony against her husband, within the exception recognized at the common law, and expressed in the Oregon statute, is not confined to cases of personal violence, but may include cases involving a tort against the wife, or a serious moral wrong inflicted upon her, and that in a case of the prosecution of a man for bringing his wife from one "state to another with intent that she shall practice prostitution, in violation of the White Slave Act, his act in so doing is such a personal injury to her as to entitle her to testify against him." (*Cohen v. United States, supra,* at p. 29.)

The above cited case was taken to the United States Supreme Court on a writ of certiorari. The petition for writ of certiorari was denied by the United States Supreme Court in *Cohen v. United States,* 235 U. S. 696, 35 S. Ct. 199, 59 L. Ed. 430.

It has often been said that the common law is not immutable but flexible and by its own principles adapts itself to varying conditions. Courts in the face of changing conditions are not chained to ancient formulae but may enforce conditions deemed to have been wrought in the common law itself by force of changing conditions. *Funk v. U.* S., 290 U. S. 371.

In *Dole v. Gear,* 14 Haw. 554, the Supreme Court of the Territory of Hawaii recognized that the common law consists of principles and not of set rules. In adopting the common law, we have adopted the fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based rather than by the words in which they are expressed.

The modern growth and development of the common law rule regarding the testimony of one spouse against the other is primarily to be found in the decisions of the Federal courts. The Federal courts have uniformly ruled that under the common law as interpreted in the light of modern experience, reason, and in the furtherance of justice, the exception to the general rule making a wife incompetent to testify against her husband in criminal cases, except when she has suffered a personal injury through his action, permits the wife to testify against her husband in a prosecution for a crime instituted by the husband which corrupts the moral of the wife.

U. S. v. Rispoli, 189 Fed. 271
U. S. v. Mitchell, 137 F. (2d) 1006
Cohen v. U. S., 214 Fed. 23
U. S. v. Williams, 55 F. Supp. 375
Denning v. U. S., 247 Fed. 463

The appellee respectfully submits that the act of the appellant as involved in this case was an offense against the person of his wife and that she was a competent witness against him in these proceedings.

B. THE EVIDENCE RELATING TO OTHER OFFENSES, THOSE COMMITTED PRIOR TO COVERTURE AND THOSE COMMITTED PRIOR TO THE STATUTE OF LIMITATIONS, WAS ADMISSIBLE, AND THE WITNESS, WHO WAS THE WIFE OF THE APPELLANT, WAS COMPETENT TO TESTIFY THERETO.

It is a well settled rule that evidence of facts showing motive, intent, plan and scheme on the part of the defendant (even though it tends to show former offenses of the defendant) may be given. "It is not error to admit evidence of facts showing motive, or

which are part of the transaction, or exhibit a train of circumstantial evidence of guilt, although such facts showed former offenses of the defendant."

Terr. v. Watanabe Masagi, 16 Haw. 196
Terr. v. Chong Pang Yet, 27 Haw. 693
Terr. v. Awana, 28 Haw. 546
Terr. v. Oneha, 29 Haw. 150
Terr. v. Abellana, 38 Haw. 532
Wharton's Criminal Evidence, 11th Ed., Vol. 1, Sec. 352, p. 527

In *Commonwealth v. Bell,* 288 Pa. 29, 135 Atl. 645, 647, the court said as follows:

"While ordinarily evidence is not admissible of a crime distinct from that for which the defendant is being tried, the fact of such crime, and defendant's connection with it, may be proved whenever it tends to show guilty knowledge, design, plan, motive or intent, if these matters are in issue in the case on trial. ***the evidence referred to would have been admissible if the first four counts had never been drawn. Upon this point it is well said by the Superior Court (Commonwealth v. Bell, 88 Pa. Super. Ct. 216, 223):

'This evidence, documentary and oral, was admissible under the well-settled rule that evidence of similar and unconnected offenses may be offered to show guilty knowledge, design, plan, motive and intent when such is in issue, and this is true although the other offenses are beyond the statutory period: (Citing authorities.) Here are the evidence tended to show that the offenses charged were part of a system ***'."

The admission of evidence showing that beyond the

statute of limitations the defendant forced the complaining witness for the prosecution by threats and intimidation into the practice of prostitution and exacted from her the proceeds of such practice was not error. This showed his scheme and design and, with other testimony, also showed that it was a continuing offense up to the dates alleged in the indictment.

The case of *U. S. v. Williams, supra,* discusses thoroughly the rule that the wife of the defendant was a competent witness to testify that prior to the marriage the defendant forced her to go into the practice of prostitution.

The Supreme Court of the Territory of Hawaii, in the instant case, in ruling on the appellant's contention that the wife was not a competent witness to testify as to acts of the defendant prior to coverture, cited *U. S. v. Williams, supra,* and stated as follows:

> ". . . to permit the wife to testify against her husband as to injuries to her morals during coverture but not as to such injuries occurring before coverture, the court would arrive at a very anomalous position; if defendant were married to the woman at the time of the offense she could testify against him, "and if defendant and the woman were not married at the time of the offense and at the time of the trial she could testify against him, but if the woman were not married to him at the time of the offense but was at the time of the trial she could not testify against him. The cases holding to this anomalous rule go on the theory that some sort of forgiveness of the wrong may be assumed by the

marriage; if the injured person desires to forget the matter and to live in a happy marital state with the one who injured her, there is an aversion to requiring or permitting her to testify against her husband whom she has forgiven. This is readily understandable. The court further points out that when personal violence is used upon a woman she is the only one injured; society may be injured very rarely if at all, but such is not the case with injuries against the wife involving moral degradation.

The Mann Act, as has frequently been stated, was to protect 'weak women from bad men' and that the purpose of the Congress would be thwarted if the woman's lips were sealed against a vicious and degraded man just because he may have induced the 'weak woman' to marry him. 'It seems sound, therefore, to conclude that, under the common law interpreted in light of modern experience, reason, and in the furtherance of justice, a woman may testify against her husband when he has transported her in interstate commerce for the purposes of prostitution in violation of the Mann Act, and this rule of evidence should apply whether the transportation occurred during or prior to coverture.' (*United States v. Williams*, 55 F. Supp. 375, at page 380.)

Obviously, the purpose of our statute relating to procuring and pimping is, as is the Mann Act, to protect 'weak women from bad men.' The same reasoning applies to it as applies to the Mann Act and the purpose would better be served by permitting the woman to testify as to the acts forcing her into the practice of prostitution prior to marriage, particularly as the husband forced her continuance in such practice, and the subsequent marriage was apparently for the very purpose of attempting to

obtain protection for the vicious man." See *Terr. v. Alford*, 39 Haw. 460.

The appellee contends that the rule in the light of modern experience is as discussed by *U. S. v. Williams, supra,* and by the Supreme Court of the Territory of Hawaii in the instant case.

CONCLUSION

It is respectfully submitted that the errors assigned by the appellant are without merit and that the judgment appealed from should be affirmed.

Dated at Honolulu, T. H., this 18th day of February, A. D. 1953.

Respectfully submitted,

ROBERT E. ST. SURE
Public Prosecutor
of the City and County of Honolulu

JAMES H. KAMO
Assistant Public Prosecutor
of the City and County of Honolulu
Attorneys for Appellee.

RECEIPT of three copies of the foregoing Brief is acknowledged this.....day of February, A. D. 1953.

THOMAS P. GILL
Attorney for Appellant.

No. 13524

United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MURIEL FIRTH, Administratrix of the Estate of Martin W. Firth, Deceased,

Appellee.

Apostles on Appeal

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Farncisco, Calif.—1-2-53

No. 13524

United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MURIEL FIRTH, Administratrix of the Estate of Martin W. Firth, Deceased,

Appellee.

Apostles on Appeal

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-26-52

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

CHAUNCEY F. TRAMUTOLO, ESQ.,
United States Attorney,

KEITH R. FERGUSON, ESQ.,
Special Assistant to the Attorney General,

HOWARD J. BERGMAN,
Special Assistant to the U. S. Attorney,

STEWART HARRISON, ESQ.,
Attorney, Department of Justice,

CHARLES ELMER COLLETT, ESQ.,
Assistant United States Attorney,
San Francisco, California,

For Appellant.

CRIPPEN & FLYNN,
SAMUEL CRIPPEN, ESQ.,
Tacoma, Washington,

WILLIAM J. O'BRIEN, ESQ.,
248 Battery Street,
San Francisco, California,

For Appellee.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty No. 25428 E

MURIEL FIRTH, Administratrix of the Estate of MARTIN W. FIRTH, Deceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

SEAMAN'S ADMINISTRATRIX LIBEL IN PERSONAM

Comes now libelant and for cause of action against respondent alleges:

I.

That libelant brings and maintains this action pursuant to the general admiralty and maritime law and jurisdiction of this court and also pursuant to the provisions of 41 Stat. 537, 46 U.S.C.A. Sec. 761, commonly known as Death on the High Seas by Wrongful Act; pursuant to the provisions of 41 Stat. 525, 46 U.S.C.A. Sec. 741, commonly known as the Suits in Admiralty Act; and pursuant to 43 Stat. 1112, 46 U.S.C.A. Sec. 781, commonly known as the Public Vessels Act.

II.

That libelant elects to take advantage of the provisions of 28 U.S.C. 1916 and to proceed herein without pre-payment of costs and fees and without security therefor.

III.

That libelant is the duly qualified and regularly appointed and acting administratrix of the estate of Martin W. Firth, deceased.

IV.

That at all times herein mentioned respondent, United States of America was and now is a nation sovereign, and was the owner and operator of that certain motor vessel "Clarksdale Victory"; that said vessel "Clarksdale Victory" at all times herein mentioned was engaged, operated and navigated by respondent in the United States Transport Service as a United States Army Transport; that said Martin W. Firth, deceased, at all times herein mentioned was employed on and aboard said vessel as a seaman.

V.

That on or about the 24th day of November, 1947, at approximately the hour of 10:00 p.m. said vessel "Clarksdale Victory," owned, maintained, managed, controlled, operated and navigated by respondent, its agents, servants and employees, was proceeding in a general southerly direction at a point approximately 140 miles southwest of Ketchikan, Alaska; that at said time and place said vessel was in a dangerous, defective, unsafe and unseaworthy condition; that at said time and place respondent by and through its agents, servants and employees, the Master and officers of said vessel, negligently and carelessly maintained, managed, controlled, operated and navigated said vessel; that

as a direct and proximate result of said dangerous, defective, unsafe and unseaworthy condition of said vessel and the said carelessness and negligence of respondent, its agents, servants and employees said vessel was caused to and did run aground and as a result thereof sank.

VI.

That as a direct and proximate result of the aforesaid unseaworthiness, negligence and carelessness and sinking of said vessel said Martin W. Firth was drowned.

VII.

That at the time of his death, said Martin W. Firth was an able-bodied man twenty-three (23) years of age and was then earning and capable of earning the sum of Four Hundred Twenty Dollars ($420.00) a month.

VIII.

That this action is brought by libelant as administratrix of the estate of said Martin W. Firth, deceased, for the benefit of Muriel Firth, the surviving spouse of deceased, and Barbara Louise Firth, a minor, the surviving daughter of deceased, both of whom were dependent upon deceased for their maintenance and support; that as a result of said wrongful death of said Martin W. Firth, deceased, said beneficiaries have been and now are deprived of the services, earnings and support and the love, affection and care and guidance of deceased; that by reason of the foregoing, libelant

has been damaged in the sum of One Hundred Thousand Dollars ($100,000.00).

Wherefore, libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue against said respondent, and that citation in personam may issue against said respondent, and that it be cited and required to appear and answer all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree the payment by respondent of the sum of One Hundred Thousand Dollars ($100,000.00) general damages, plus costs of suit herein, and for such other and further relief as is meet and just in the premises.

WILLIAM J. O'BRIEN,
SAMUEL L. CRIPPEN,
CREIGHTON FLYNN,
HAROLD A. SEERING,

By /s/ WILLIAM J. O'BRIEN,
Attorneys for Libelant.

Duly verified.
[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

ANSWER

Now comes respondent United States of America and answers the libel on file herein as follows:

I.

Respondent denies the allegations of Article I.

II.

Respondent is not required to answer the allegations of Article II.

III.

Respondent has no information or belief as to the allegations of Article III and demands strict proof thereof.

IV.

Respondent admits the allegations of Article IV.

V.

Respondent admits that on or about the 24th day of November, 1947, at approximately the hour of 10:00 p.m. the "Clarksdale Victory," owned, maintained, managed, controlled, operated and navigated by respondent, its agents, servants and employees, was proceeding in a general southerly direction at a point approximately 140 miles southwest of Ketchikan, Alaska. Respondent denies the remaining allegations of said Article V.

VI.

Respondent denies the allegations of Article VI.

VII.

Respondent denies the allegations of Article VII.

VIII.

Respondent denies the allegations of Article VIII, and particularly that libelant has been damaged in the sum of $100,000.00 or any part thereof.

As and for a First Separate and Distinct Defense to the Libel Filed Herein, Respondent Alleges:

I.

The District Court does not have jurisdiction under the Public Vessels Act, 1925 (46 U.S.C. 781) or a claim by the beneficiary, or any other person, arising out of the death of Martin W. Firth, a civilian member of the crew of a public vessel of the United States of America, said death having occurred during the performance by the deceased of his duties as such member of the crew on board such public vessel, the United States of America not having consented to be sued for such a claim.

As and for a Second Separate and Distinct Defense to the Libel Filed Herein, Respondent Alleges:

I.

That the deceased, Martin W. Firth, was on the 24th day of November, 1947, employed by respondent as a seaman on the USAT Clarksdale Victory, pursuant to the terms and conditions of a certain contract for service as a civilian employee of the War Department.

II.

That under said contract of employment the said Martin W. Firth was at the time of his alleged death a civil service employee of respondent United States of America, by and through the War Department, being employed upon a public vessel of the United States of America, namely, the USAT Clarksdale Victory. That as such civil service employee Martin W. Firth was an officer of the United States of America, and the remedy of libelant for benefits for the death of said Martin W. Firth is governed by the provisions of Section 751 of Title 5 of the United States Code, which said statute is exclusive.

As and for a Third Separate and Distinct Defense to the Libel Filed Herein, Respondent Alleges:

I.

Respondent refers to the allegations of Articles I and II of the Second Separate and Distinct Defense, hereinabove, and incorporates and makes the same a part hereof.

II.

Under the terms of the said contract of employment of Martin W. Firth by the War Department, the War Department agreed to provide benefits for injury or death of a member of the crew of said vessel, subject to the agreed conditions that where such person, or the beneficiary of such person, also becomes entitled to any statutory benefit on account of such death, such person or any such beneficiary

shall be entitled only (1) to the benefit provided by the War Department, or (2) to such statutory benefit. Any benefits received under either the War Department provisions or the statutory benefit shall be set off one as against the other.

III.

Muriel Firth, the widow of Martin W. Firth, in accordance with the terms of the said contract of employment of Martin W. Firth by the War Department, and with the rules and regulations prescribed by the War Department, has elected to receive the benefits provided by the War Department in lieu of statutory benefits and has filed a claim with the War Department for the payment of said benefits.

As and for a Fourth Separate and Distinct Defense to the Libel Filed Herein, Respondent Alleges:

I.

Respondent refers to the allegations of Article I of the Second Separate and Distinct Defense, hereinabove, and incorporates and makes the same a part hereof.

II.

That on the said 24th day of November, 1947, the said USAT Clarksdale Victory stranded on Hippa Island in Southern Alaskan waters of the Pacific Ocean, solely by reason of perils of the sea, and become a total loss. That in the event the said Martin W. Firth met his death on said 24th day of November, 1947, said death was caused solely by perils of the sea, which was a risk assumed by

said Martin W. Firth under his contract of employment, for which respondent is not liable.

Wherefore, respondent prays that the libel be dismissed and that respondent have its costs of suit and such other and further relief as may be meet in the premises.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Proctors for Respondent.

[Endorsed]: Filed January 14, 1950.

In the District Court of the United States for the Northern District of California, Southern Division

Admiralty Nos. 25081, 25083, 25123, 25266, 25257, 25312, 25413 and 25428

GENE GERARDO, as Administrator of the Estate of AQUILINO BANGLOY, Deceased,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent,

And Nine Companion Cases.

MEMORANDUM OPINION

Libelants, heirs of several seamen and two work-a-ways on board the Clarksdale Victory, seek to recover damages against respondent for the negli-

gent operation of the ill-fated vessel. On November 24, 1947, the Clarksdale Victory ran on the reefs off of Hippa Island, Queen Charlotte Group, B. C. There were but four survivors.

At the lengthy trial, evidence established the fact that the vessel left Alaska on November 22, 1947. On the morning of November 23, it set a course of 132° and shortly thereafter altered such course to 134° at Hinchinbrook. The navigating officer maintained this course until shortly before the disaster which caused the ship to perish. The primary question for the Court to consider in ascertaining negligence is why the ship continued on the southerly course as long as it did and in the manner it did.

On November 24th about 8:30 p.m. the Clarksdale Victory struck an object variously described as a reef or a log. After such striking, the ship altered its course to 145°. Within a period of approximately twenty minutes the vessel crashed on the rocks and reefs off of Hippa Island and sank soon thereafter.[1]

---

[1]Chronology, Last Watch

8:00 p.m.—Mr. Rasmussen, Third Officer, relieves Mr. Wolfe; wind: between a 4 and 6; visibility: 8-10 miles every direction. Wolfe remains to take bearings.

8:15 p.m. "or shortly before 8:30"—Visibility drops one mile to zero; weather conditions change; wind "appears to increase"; Rasmussen notifies master; speed not reduced; still 15-15½ knots.

8:25-8:30—Wolfe still in chartroom; apparently does not go to bridge; has no idea of lowered visi-

During his pursuance of a course of dead reckoning heading South at 134°, the navigating officer had few radio fixes and was unable to ascertain the ship's specific location. The master believed, by reason of past experience in the same waters, that he was 15 to 25 miles from land at the time of the actual crash. As events turned out, landward drift or set had taken the ship these many miles off of its intended course and placed it in dangerous waters. After 8 p.m. of the evening of the crash, visibility was cut from good (up to 10 miles) to poor (1 mile down to 500 yards) by reason of fog conditions. During the period of minimum visibility, the vessel did not cut its speed from its regular 15½ knots to 16½ knots, nor did it exercise other precautions commensurate with weather and other conditions.

---

bility when he leaves for his quarters. His testimony as to time of departure—"a litle short of a half hour after 2000." Until this time the object had not been struck.

8:35-8:39—Vessel strikes object on bottom followed by decided snap rolls, etc.; Captain now on bridge. Tells Rasmussen to lash down instruments in charthouse. Object later described as reef or rocks, causing vessel to shudder.

8:40—Wolfe now returns to chartroom from his quarters, partially dressed; attempts to use fathometer. States he came up because unusual violence in roll of ship.

8:40-8:45—Wolfe states change of course came 5-10 minutes before 2050. Course change 11° to 145°; speed still about 15-15½ knots, but course change came after Wolfe returned, not before 8:40.

8:50—Vessel crashes with violence upon the rocks 500 or less yards from the shore.

Libelants review and summarize the series of failures on the part of the officers of the ship which led directly or indirectly to the disaster. In addition to their failure to cut speed and otherwise comply with statutory regulations governing operations in fog, they made no use of the lead to ascertain depth. Nor did the officers use the fathometer until the very last moment. They failed to make allowance for set or drift of their ship during the period of navigating on a fixed course. Further, at the very outset of their voyage they failed to lower their booms. Such failure created a condition which made radio beacon reception less accurate than it otherwise would have been.

The ship's officers, after receiving the warning of striking an object some 20 minutes before the final stranding and noting heavy swells and wave conditions indicative of nearness to land, failed to turn hard right and head straight to sea.

Respondent seeks to rebut libelants' showing of negligence by observing that the standard of care imposed upon a master and his fellow officers is not the standard of hindsight wisdom, but rather that of the reasonable man under the circumstances at the time of his control of the vessel. Analyzing each act of omission or commission, respondent attempts to explain why the captain and his assistants did what they did and omitted to do those things which libelants contend were crucial for the proper navigation of the Clarksdale Victory.

The Court is of the view that the several elements of omission established by the evidence combine

to characterize the master's control of his vessel as negligent under all of the circumstances. This is especially true after the vessel struck the reef or "log" and was forewarned of likely disaster unless extreme precaution should be taken. Despite heavy fog, ground swells, lack of knowledge as to exact location, and ignorance as to depth, respondent failed to slow down or head to sea. Such failures led directly to the sinking of the Clarksdale Victory. Respondent must be held liable for the loss of lives of the members of the crew and the work-a-ways.

In view of the Court's finding that respondent was negligent in its handling of the Clarksdale Victory immediately prior to the striking of land, the question of damages must be answered. The several individuals who are seeking relief form a mixed group which must be treated, in most cases, upon an individual basis.

Before the Court assesses damages, it will make two preliminary observations:

(1) Recovery is limited to actual pecuniary loss; there may be no award for consortium. 46 U.S.C.A. 688; 45 U.S.C.A. 51; Devine v. Chicago Railroad, 239 U.S. 52; Belzoni Hardwood Lumber Co. v. Langford, 127 Miss. 234; Berry v. St. Louis RR., 26 S. W. (2) 988.

(2) In the case of the deceased seaman with the exception of Carroll W. Key whose heirs are seeking damages, the Court award is in excess of and in addition to the $5,000 war risk insurance policy which has been paid. With respect to decedents

Firth and Webb, no war risk insurance policy is involved.

The administrator of the estate of Aquilino Bangloy is awarded the sum of $1,000 damages.

The administrator of the estate of Pablo Gonzales is awarded the sum of $1,200 damages.

The administrator of the estate of James L. Starkey is awarded the sum of $5,500 damages.

The administrator of the estate of Carroll W. Key is awarded the sum of $10,000 damages.

The administratrix of the estate of Martin W. Firth is awarded the sum of $15,000 damages.

The administratrix of the estate of Dallas Warrick Webb is awarded the sum of $16,000.

The administratrix of the estate of James Anthony Kaye is awarded the sum of $9,000.

With respect to the administratrix of the estate of Samuel R. Marteen, the Court finds that such administratrix, Virginia Marteen, elected to receive an award of compensation under the Employees' Compensation Act and that she received monthly compensation checks for many months after making such election with knowledge of her rights. Under the facts of the case, Mrs. Marteen is precluded from suing respondent for damages (Gibbs v. United States, 94 F. S. 586). Accordingly, the Court makes no award in favor of libelant Virginia Marteen and the libel is dismissed.

Counsel for libelants to whom damages have been awarded will prepare findings of fact and conclusions of law in accordance with this opinion.

Dated: November 14, 1951.

GEORGE B. HARRIS,
United States District Judge.

[Title of District Court and Cause.]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above libel, consolidated with seven (7) other libels, Numbers 25081 G, 25083 R, 25123 G, 25266 R, 25267 H, 25312 H and 25413 R respectively, came on regularly for trial and hearing before the Court on March 6, 1951, all parties appearing by and through their respective proctors, and thereafter was continued for further hearings pursuant to orders of the Court, duly made and entered, said hearings continuing intermittently from March 6, 1951, until June 21, 1951, and oral and documentary evidence having been offered, introduced and received, and the matter having been argued, briefed and submitted, the Court, being fully apprised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

I.

That on November 24, 1947, and all of the times hereinafter mentioned, Martin W. Firth, deceased,

was a civilian in the employ of respondent as a seaman, to wit, a work-a-day, and was upon and aboard the United States Army Transport (U.S.A.T.) "Clarksdale Victory," a vessel owned and operated by respondent and was engaged in the course and scope of his employment for and on behalf of respondent when said vessel ran aground, stranded and broke up, the cause of said stranding and breaking of said vessel and the resultant death of decedent by reason thereof being hereinafter more particularly set forth.

II.

That heretofore, to wit on the 8th day of March, 1948, after proceedings regularly and duly had for such purpose, libelant herein was duly appointed administratrix of the estate of Martin W. Firth, deceased, by the Superior Court of the State of Washington, in and for the County of Pierce, and thereafter was duly qualified as such administratrix and issued letters of administration and thereupon entered upon the administration of said estate as provided in the order of said Court, and ever since has been and now is the appointed and duly qualified and acting administratrix of said decedent with full right and powers to bring this cause of libelant.

III.

That on November 24, 1947, and at all of the times herein mentioned the United States, a sovereign nation, and respondent herein, was the owner and operator of the aforementioned U.S.A.T. "Clarksdale Victory" and used and operated said

vessel in the operations, business and affairs of the Water Division, United States of America Transportation Corporation.

IV.

That on November 24, 1947, between the hours of 8:00 p.m. and 8:50 p.m. and prior thereto, and while said vessel was being operated, navigated and sailed in a general southerly direction upon the waters of the Pacific Ocean enroute from Whittier, Alaska, to Seattle, Washington, and following the "outside route," respondent, in the face of fog, adverse weather and impaired and limited visibility conditions, negligently failed to exercise ordinary care and prudence in the use, operation, navigation and sailing of said vessel; negligently failed to reduce the forward speed of said vessel from its regular and continued speed ahead of 15½ to 16½ knots per hour; negligently failed to exercise care and precautions commensurate with prevailing weather and other conditions existing at the time; negligently failed to comply with statutory requirements, regulations and rules governing the use, operation, movement and navigation and sailing of said vessel in and under fog and adverse weather conditions; negligently failed to use and properly use all of the available navigation aids, instruments and equipment aboard said vessel and particularly failed to use the lead line to ascertain the depth of the ocean and failed to use the fathometer until shipwreck and stranding was imminent; negligently failed to make due and proper or any allowance for the set or drift of said vessel inward toward land-

fall during the period of navigation, movement and sailing of said vessel on a fixed course; negligently failed to lower and cradle certain booms which affected, interfered with and made less accurate the radio direction finder and radio beam and beacon reception available to said vessel; negligently failed to apprise, evaluate and heed the forewarning of danger and disaster when the vessel struck a reef or log in or under the surface of the ocean approximately 20 minutes before the eventual stranding and break-up of said vessel; negligently failed to slow speed, stop or change or swerve course and head out to open sea and away from the shoreline and landfall despite heavy fog, ground swells and lack of knowledge as to the fix and exact position and location of said vessel and the ignorance of the depth of the ocean upon which said vessel was there and then sailing.

V.

That solely by reason of the aforesaid negligent acts of omission, the Master's supervision and control of the vessel was negligent under all circumstances and conditions, and as a direct and proximate consequence and result thereof, said vessel, the U.S.A.T. "Clarksdale Victory," was allowed and permitted to and did run aground upon the reefs and shoals, rocks and shoreline of Hippa Island, Queen Charlotte Group, British Columbia, at which time, place and point said vessel broke asunder, proximately bringing about and causing the death of said Martin W. Firth, and other seamen who were then and there aboard said vessel.

VI.

That said Martin W. Firth, deceased, died on the 24th day of November, 1947, by reason of the aforesaid premises and circumstances, and left surviving his spouse, Muriel Firth, libelant herein, of the age of 22 years, and a minor child, to wit, a daughter named Barbara Louise Firth of the age of 1 year, who were and are the sole surviving heirs at law of said deceased; that said surviving heirs of deceased were dependent upon deceased for aid, maintenance and support and deceased contributed to the aid, maintenance and support of said surviving heirs; that by reason of the death of said deceased, said surviving spouse and minor child of deceased have been deprived of his said aid, maintenance and support and have suffered and will continue to suffer actual pecuniary loss and damage by reason thereof and will be deprived of said services, aid, maintenance and support of said decedent for the balance of their natural lives.

VII.

That at the time of his death, said Martin W. Firth, deceased, was of the age of 23 years, able bodied and in good physical and mental health and condition and was capable of working and earning and did work and earn income for the support of himself and family.

VIII.

That no compensation, war risk or other insurance benefits were or have been paid by the United States Government to the estate of said Martin W.

Firth, deceased, or to said surviving spouse or minor child of deceased, because of the death of said deceased caused as aforesaid and no compensation, war risk or other insurance is involved and the amount of damages herein awarded includes such benefits if the same were allowed.

IX.

That Libelant as administratrix of the estate of said Martin W. Firth, deceased, by reason of the death of said deceased caused as aforesaid, is entitled to damages in the sum of Fifteen Thousand Dollars ($15,000.00).

Conclusions of Law

As conclusions of law from the foregoing facts, the Court finds:

I.

That the Court has jurisdiction of the above-entitled libel under the general admiralty and maritime law and other applicable laws and statutes of the United States pertaining hereto, and specifically, the Public Vessels Act, 46 U.S.C. 781, and the suits in Admiralty Act, 46 U.S.C.A. 741.

II.

That respondents negligently maintained, used, supervised, operated, navigated and sailed the aforesaid vessel, the U.S.A.T. "Clarksdale Victory" at the time, place and hour of the stranding and breaking up of said vessel and the resulting death of Martin W. Firth, deceased, as hereinabove more

particularly set forth, and that such negligence of respondent contributed proximately to his death.

III.

That libelant, Muriel Firth, as the administratrix of the estate of Martin W. Firth, deceased, is entitled to judgment against respondent in the sum of Fifteen Thousand Dollars ($15,000.00) plus allowable costs incurred herein.

Let Decree and Judgment Be Entered Accordingly.

Dated: March 7, 1952.

/s/ GEORGE B. HARRIS,
Judge of the United States
District Court.

Receipt of copy acknowledged.

Lodged February 28, 1952.

[Endorsed]: Filed March 7, 1952.

In the District Court of the United States for the Northern District of California, Southern Division

(Admiralty) Number 25428 E

MURIEL FIRTH, Administratrix of the Estate of MARTIN W. FIRTH, Deceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

The above-entitled libel came on regularly for trial on March 6, 1951, in the above-entitled court, before the Honorable George B. Harris, judge, presiding, sitting without a jury, all parties appearing by and through their respective proctors, Crippen & Flynn, Tacoma, Washington, by Samuel Crippen and William J. O'Brien, 248 Battery Street, San Francisco, California, appearing as proctors for libelant herein, and Chauncey F. Tramutolo, United States Attorney, Keith R. Ferguson, Special Assistant to the Attorney General, Howard J. Bergman, Special Assistant to the United States Attorney, Stewart Harrison, Attorney, Department of Justice, Charles Elmer Collett, Assistant United States Attorney, appearing as proctors for respondent, and thereafter was continued for further trial pursuant to orders of the Court, duly made and entered, said hearings continuing intermittently from said March 6, 1951, until June 21, 1951, and

evidence, both oral and documentary, having been introduced, written briefs having been filed and the matter having been submitted for decision, and the Court having heretofore made and caused to be filed its written findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed that libelant herein, Muriel Firth, as administratrix of the estate of Martin W. Firth, deceased, recover from respondent Fifteen Thousand ($15,000.00) Dollars, together with costs amounting to $397.93.

Dated March 7, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed March 7, 1952.

Entered March 10, 1952.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty—No. 25428-E

MURIEL FIRTH, Administratrix of the Estate of MARTIN W. FIRTH, Deceased,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 25081-G

GENE GERARDO, as Administrator of the Estate of AQUILINO BANGLOY, Deceased,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 25083-R

ROMUALDO G. QUIMPO, as Administrator of the Estate of PABLO GONZALES, Deceased,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 25123-G

ELIZABETH STELLA KAYE, as Administratrix of the Estate of JAMES ANTHONY KAYE, Deceased,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 25266-R

LEE STARKEY, as Administrator of the Estate of JAMES L. STARKEY, Deceased,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 25413-R

IDA ELLEN WEBB, as Administratrix of the Estate of DALLAS WARRICK WEBB, Deceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO VACATE JUDGMENTS AND FOR DISMISSAL OF LIBELS

Comes now the respondent, United States of America, and moves the Court to vacate the judgments entered in the above-captioned causes on the ground that the United States Supreme Court, subsequent to the entry of said judgments and on May 26, 1952, rendered its decision in the cases of Konrad G. Johansen v. United States of America, Supreme Court No. 401, and Samuel Mandel, Administrator, v. United States, Supreme Court No. 414, in which it held that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels, which is adverse to the decision of this Court in rendering judgments in the above-captioned causes.

I.

That judgments in the above-captioned causes were signed by the above-entitled Court on March 7, 1952, and entered on March 10, 1952, and that the time for appeal from said judgments does not expire

until 90 days thereafter, and that said judgments have therefore not become final.

II.

That this Court in its findings of fact, upon which said judgments were based, found that the deceased in each case was a civilian employed by the respondent as a seaman on the United States Army Transport, Clarksdale Victory, a public vessel of the United States, a sovereign nation, and as such was a member of the crew of said vessel and was engaged in the course and scope of his employment upon the date and approximate hour of his death.

III.

That the United States Supreme Court in its decision in the said Johansen and Mandel cases held:

> "All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels."

IV.

That the time in which respondent may appeal from such judgments expires on or about June 5, 1952, and that unless said judgments are vacated prior to that time it will be necessary for respondent to file its appeal to the Court of Appeals for the Ninth Circuit.

V.

That under the decision of the United States Supreme Court in the said Johansen and Mandel cases, the Federal Employees Compensation Act is

the exclusive remedy of the libelants and their actions herein are barred and the said judgments so entered herein are void in that the Court had no power to grant the relief awarded in said judgments, and said judgments should be vacated and the libels dismissed.

Wherefore, respondent prays that this Court vacate each of the judgments entered in the above-entitled causes and that the libels therein be dismissed.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ J. STEWART HARRISON,
Attorney, Department of
Justice.

NOTICE OF HEARING OF MOTION

To Libelants Above Named and to Messrs. Belli, Ashe & Pinney and Messrs. William J. O'Brien and Samuel L. Crippen, Creighton Flynn, and Harold A. Seering, Their Proctors:

You and Each of You will please take notice that on Monday, the 2nd day of June, 1952, in the courtroom of the Honorable George B. Harris, Judge of the above-entitled Court, at 10:00 a.m. or as soon thereafter as counsel can be heard, respondent will

call up for hearing the above motion to vacate said judgments and for dismissal of the libels.

Dated May 29th, 1952.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Respondent.

Points and Authorities

Konrad G. Johansen v.
United States of America, U. S. Supreme Court No. 401 (not yet reported), October term, 1951;

Samuel Mandel, Administrator, vs.
United States, U. S. Supreme Court No. 414 (not yet reported), copy of Opinion being attached hereto;

United States vs. Turner,
47 F.(2d) 86 (CA 8th);
Windsor vs. McVeigh,
93 U. S. 274, 282.

McLellan vs. Automobile Insurance Co. of Hartford, Conn., et al. (CA 9th), 80 F.(2d) 344.

Receipt of copy acknowledged.

[Endorsed]: Filed May 29, 1952.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO VACATE JUDGMENTS AND TO DISMISS LIBELS

The Government has moved the Court to vacate its judgments and to dismiss the libels in the above-entitled actions. It relies upon the recent Supreme Court decision in Johansen vs. United States and Mandel vs. United States, Nos. 401 and 414, United States Supreme Court, decided May 26, 1952.

It is to be noted that the Supreme Court decision in the Mandel and Johansen cases is not final; counsel have until June 10th to file their petitions for rehearing. The five to four decision of the Supreme Court suggests that a different result might follow if such petition for rehearing is granted. The court observes that two of the libelants in the instant case were not Civil Service employees on a government vessel, but were work-a-ways utilizing the Clarksdale Victory as a means of transportation from Alaska to the United States. The Supreme Court ruling, as we view it, does not hold that such work-a-ways are covered exclusively by the Federal Employees' Compensation Act. Thus it would be inappropriate for the Court to vacate its judgment as to these libelants quite apart from the remaining libelants.

In the light of the entire record, this Court believes that the motion to vacate judgments and to dismiss the libels is prematurely brought, and in at least two instances is not well taken under the ruling of the Supreme Court as it now stands.

Accordingly, It Is Oredered that the motions to vacate judgments and to dismiss be, and the same hereby are denied and each of them is denied.

Dated June 3, 1952.

GEORGE B. HARRIS,
United States District Judge.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the respondent, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree made and entered herein on March 10, 1952, in favor of the above-named libelant, and also from the order entered June 3, 1952, denying the Motion of Respondent to vacate said judgment and to dismiss the libel.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Respondent.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 5, 1952.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Ordered that the appellant, United States of America, may have to and including September 3, 1952, to file the Apostles on Appeal in the United States Court of Appeals for the Ninth Circuit.

Dated July 15, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

It Is Hereby Stipulated and Agreed that the foregoing Order Extending Time to Docket may be issued by consent of all parties, and receipt of same is hereby acknowledged this 14th day of July, 1952.

WILLIAM J. O'BRIEN,

SAMUEL L. CRIPPEN,

CREIGHTON FLYNN, and

HAROLD A. SEERING,
Proctors for Libelant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 15, 1952.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

In support of its appeal herein, respondent and appellant United States of America hereby assigns error in the proceedings, orders, and final decision and Decree of the District Court in the above-entitled cause as follows:

1. The District Court erred in failing to find and determine that the deceased, Martin W. Firth, being at the time of his death an employee of the United States as a member of the civil service component of the United States Army Transport Clarksdale Victory, his administratrix was entitled as the personal representative of such employee, to the benefits under the Federal Employees Compensation Act of 1916, 39 Stat. 742, 5 U. S. Code, Sec. 751, et seq.

2. The District Court erred in failing to find and conclude that the benefits available to the libelant, under the Federal Employees Compensation Act of 1916, 5 U. S. Code, Section 751, et seq., are of such a nature as to preclude recovery in this action by the libelant.

3. The District Court erred in failing to find and determine that the Federal Employees Compensation Act is the exclusive remedy of libelant herein.

4. The District Court erred in finding and concluding that the respondent, United States, has consented to be sued herein for the death of Martin

W. Firth, occasioned during his employment as a member of the civil service component of the United States Army Transport Clarksdale Victory, under the general admiralty and maritime law and other laws and statutes of the United States pertaining hereto, and specifically the Public Vessels Act, 46 U.S.C. 781, and Suits in Admiralty Act, 46 U.S.C.A. 741.

5. That the District Court erred in finding and concluding that the libelant was entitled to recover the sum of $15,000.00 herein.

6. That the District Court erred in entering decree against respondent for $15,000.00.

7. That the District Court erred in denying the motion of respondent to vacate its judgment herein and dismiss the libel.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

[Endorsed]: Filed September 9, 1952.

In the District Court of the United States for the Northern District of California, Southern Division

No. 25428

Before: Hon. George B. Harris, Judge.

MURIEL FIRTH,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

HOWARD BERGMAN, ESQ.,
STEWART HARRISON, ESQ.

For the Respondent:

WILLIAM J. O'BRIEN, ESQ.,
SAMUEL L. CRIPPEN, ESQ.

MURIEL FIRTH

called as a witness on her own behalf, sworn.

The Clerk: Please state your name, your address and your occupation, if any, to the Court.

A. Muriel Firth, 305 Stanford Street, Tacoma, Washington, secretarial work.

(Testimony of Muriel Firth.)

Direct Examination

By Mr. Crippen:

Q. Mrs. Firth, are you the widow of Martin W. Firth? A. Yes.

Q. What is your present age, Mrs. Firth?

A. 25.

Q. You are 25 now? A. That is right.

Q. As a result of your marriage with Mr. Firth, do you have any children? A. Yes, one.

Q. And her name? A. Barbara Louise.

Q. And her age, please? A. Four.

Q. At the time of Mr. Firth's death—by the way, what was his date of death? [2*]

A. Let's see, I guess it was November 22.

Q. Wasn't it the 24th?

A. Something in there.

Q. Did Mr. Firth die as a result of the stranding of the Clarksdale Victory? A. Yes.

Q. November 24, 1947. How old was your daughter at that time? A. Just one year.

Mr. Crippen: One year old. Would you mark this, please?

(Thereupon, the Clerk marked the document above referred to.)

Q. (By Mr. Crippen): Handing you libelant's identification—I can't make out this number, Mr. Magee.

The Clerk: 33 for identification.

Q. (By Mr. Crippen): Libelant's 33 for iden-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Muriel Firth.)

tification. Will you tell the Court what that is, please? A. It is a death certificate.

Q. Of whom? A. Martin W. Firth.

Q. Thank you. I offer this as libelant's exhibit, your Honor, the death certificate of Martin W. Firth.

The Court: I assume it is a copy. Is there any dispute about the fact of death?

Mr. Bergman: None, your Honor, but that would appear to [3] be wholly hearsay evidence of a person who made it out. I don't know what the offer is made for.

Mr. Crippen: You mean that he will not stipulate that that is an official death certificate, Mr. Bergman?

Mr. Bergman: No, I don't mean that at all. That isn't what I have objection to. It is the cause of the death. It contains other information, your Honor, unrelated to the cause of the death which obviously would make it——

Mr. Crippen: So far as the other information is concerned, your Honor, it is not offered for that. It is merely offered as an official certificate of death and for that purpose alone.

The Court: And to prove the fact. Counsel stipulates to the fact of death, isn't that true?

Mr. Bergman: I agree, your Honor, that the deceased died as a result of the loss of the Clarksdale Victory.

The Court: As the proximate result of the loss of the ship.

(Testimony of Muriel Firth.)

Mr. Bergman: Proximate direct result.

The Court: It may be marked for identification.

The Clerk: Libelant's exhibit 33 for identification.

(Thereupon, the document above referred to was received and marked libelant's exhibit number 33 for identification.)

Q. (By Mr. Crippen): Mrs. Firth, following the death of [4] Martin W. Firth were you duly and regularly appointed the administratrix of the estate of Martin W. Firth in Pierce County, Washington? A. Was I appointed?

Q. Yes. A. Yes.

Mr. Crippen: As I understand it, the Government refused to stipulate on this, so I have an exemplified copy, your Honor. I show this to you, counsel, an exemplified copy of Letters of Administration.

Q. (By Mr. Crippen): Were you appointed administratrix of the estate of your husband, Mr. Firth, on March 8, 1948, as set forth in that exhibit?

A. Yes, I was.

Mr. Crippen: I offer certificate of appointment and an exemplified copy of Letters of Administration from State Courts of Pierce County, Washington.

Mr. Bergman: No objection.

The Court: They may be received and marked.

The Clerk: Libelant's exhibit 34 in evidence.

(Testimony of Muriel Firth.)

(Thereupon, the documents above referred to were received in evidence and marked libelant's exhibit number 34.)

Mr. Crippen: I offer in evidence now, your Honor, libelant's identification number 35, which is a birth certificate of Martin W. Firth, showing his birth to be [5] November 19, 1924, at Tacoma, Pierce County, Washington.

The Court: It may be marked.

Mr. Bergman: No objection.

The Clerk: Libelant's exhibit 35 in evidence.

(Thereupon, the document above referred to was received in evidence and marked libelant's exhibit number 35.)

Mr. Crippen: I now offer in evidence certificate of birth of the witness, Mrs. Muriel Firth, showing her birth to be December 24, 1925, in Chicago, Illinois, your Honor.

The Court: It may be marked in evidence.

The Clerk: Libelant's exhibit 36 in evidence.

(Thereupon, the document above referred to was received in evidence and marked libelant's exhibit number 36.)

Q. (By Mr. Crippen): Mrs. Firth, were you married on December 13, 1945, to Martin W. Firth?

A. Yes.

Q. Where was that marriage?

A. Tacoma, Washington.

(Testimony of Muriel Firth.)

Q. Tacoma, Washington? A. Yes.

Mr. Crippen: I offer in evidence libelant's identification number 38, being a photostatic copy of the certificate of marriage, your Honor.

The Court: It may be marked.

The Clerk: Libelant's exhibit 38 in evidence. [6]

(Thereupon the document above referred to was received in evidence and marked libelant's exhibit number 38.)

Mr. Crippen: This is the birth certificate of the child.

Q. (By Mr. Crippen): Handing you libelant's identification number 37, Mrs. Firth, what is that, please?

A. It is the birth certificate of my daughter.

Q. Of your daughter? A. Yes.

Q. And her name?

A. Barbara Louise Firth.

Q. And what was the date of her birth?

A. November 8, 1946.

Q. November 8, 1946? A. Yes.

Mr. Crippen: I offer libelant's identification number 37 in evidence, your Honor.

The Court: It may be marked.

The Clerk: Libelant's exhibit 37 in evidence.

(Thereupon the document above referred to was received in evidence and marked libelant's exhibit number 37.)

Q. (By Mr. Crippen): Had your husband been in the Army services, Mrs. Firth? A. Yes.

(Testimony of Muriel Firth.)

Q. Over what period of time was he in the [7] Army?

A. Oh, let's see. Well, he left school about when he was 15 or 16 and went into the regular Army, and he was in there until his mother finally got him out. After he got out he was redrafted into the Services and he was discharged in 1945, I believe.

Q. He was discharged how long before your marriage on December 13 of 1945?

A. Approximately a week.

Q. Approximately a week prior to that time?

A. Yes.

Mr. Crippen: I now offer in evidence the libelant's identification 39 and 40 showing—which constitutes an Honorable Discharge from the Army with the pertinent facts thereon; offer that in evidence as the next exhibit.

The Court: So ordered.

The Clerk: Libelant's exhibits 39 and 40 in evidence.

(Thereupon the documents above referred to were received in evidence and marked libelant's exhibits numbers 39 and 40, respectively.)

Q. (By Mr. Crippen): So that up until a week prior to your marriage Mr. Firth had been in the Army? A. Yes.

Q. Will you tell the Court what work Mr. Firth did following your marriage, to the best of your recollection, in the early part of 1946? [8]

A. Well, he didn't do too very much. He didn't

(Testimony of Muriel Firth.)

quite get settled down, and he did take employment at the shipyards for a while.

Q. Where was that?

A. In Tacoma, Washington. And he was employed there until they terminated him, they were cutting down on their crews at that time, so it wasn't over a great period of time he was employed. He took various other jobs, never settling down to one job exactly. He received compensation from the Government on the Veterans—well, his Veteran—I don't know.

The Court: Disability? Was he disabled?

A. No, not disability.

Q. (By Mr. Crippen): Well, it was the Veterans 5221 compensation for unemployment?

A. That is correct.

Q. Mr. Firth worked at the shipyards until that plant closed, did he?

A. Until he was laid off there, yes.

Q. That was at Tacoma?

A. Yes, Tacoma.

Q. Now, in the early part of 1947 was Mr. Firth employed, Mrs. Firth?

A. The early part of '47?

Q. 1947. [9] A. Let's see——

Q. Well, to refresh your recollection, when did Mr. Firth go to Alaska?

A. Oh, well, he went up to Alaska in June.

Q. Of what year? A. Of 1947.

Q. And prior to going to Alaska in June of 1947,

(Testimony of Muriel Firth.)

the preceding months of that year had he been employed?

A. Yes, he was employed for a time in Tacoma, DuPont Company.

Q. The DuPont Nemours Company?

A. That is correct.

Q. Handing you libelant's—pardon me.

(Thereupon Mr. Crippen showed the above-mentioned document to Mr. Bergman.)

Q. (By Mr. Crippen): Mrs. Firth, handing you libelant's identification number 41 which purports to be a certified copy of an income tax return filed by you following the death of your husband for his estate, I will ask you if that is a joint return wherein some earnings there are listed separately to you? A. It is a joint return, yes.

Q. And what item there is your earnings?

A. Tacoma Metal Products Company, $907.50.

Q. Is the balance of the return and the items listed there the earnings of your husband? [10]

A. The balance, yes.

Q. Is there any item there representing employment for the year 1947 prior to June when your husband went to Alaska?

A. There is an item, yes; the DuPont Company.

Q. One item? A. Uh-huh.

Q. What does that show, please?

A. The I. DuPont Company, Tacoma, $81.98.

Q. Did you compile this return of your husband's earnings from slips and records received by

(Testimony of Muriel Firth.)

you from his employers showing the amounts received by him? A. That is correct.

Q. The principal item here appears to be Ocean Tow, Incorporated. Was your husband employed by that company? **A. That is right.**

Q. That is a Seattle company, is it?

A. I believe it was a Seattle company.

Q. Where was his employment with them, however? A. In Whittier, Alaska.

Q. That is an item of $1,369.84. Can you tell us what period of time that is for?

A. Yes, it was, I believe, from September up until the time he left.

Q. Did you receive a letter from the company, Ocean Tow Company, setting forth his rate of pay and the period of time [11] during which he worked for them that he earned the $1,369.84?

A. Yes, I believe I did.

Mr. Bergman: Was the last exhibit offered in evidence?

Mr. Crippen: I haven't as yet. I am going through the items first.

Q. (By Mr. Crippen): Is this a copy of the letter directed to Commander Bergman confirming your husband's earnings, the rate and the period of time received by you? A. Yes.

Q. Would you read that, please?

A. "At the request of counsel for Muriel Firth, Ocean Tow, Inc., furnishes the following information:

"Our records show that Martin W. Firth was

(Testimony of Muriel Firth.)

employed by Ocean Tow, Inc., on September 8, 1947, as a longshoreman at Whittier, Alaska, working for this company until the 22nd day of November, 1947.

"His rate of pay was $1.62 per hour and his earnings while in our employ totaled $1,369.84."

Q. So that the $1,369.84 was earned in a period of two and a half months employment with the Ocean Tow Company? A. That is correct.

Mr. Crippen: I will offer that in evidence, your Honor.

The Court: So ordered.

The Clerk: Libelant's exhibit 42 in evidence.

(Thereupon the document above referred to was received [12] in evidence and marked Libelant's exhibit number 42.)

Q. (By Mr. Crippen): The other items of earnings here listed by you on your income tax return for the estate of your husband are Myrtle and Green and Mathis at Anchorage, $47.85. That was sometime during the fall before he went to work for the Ocean Tow? A. That is right.

Q. And Morrison Knudsen Company, that was also Alaska? A. Uh-huh.

Q. That shows an item of $194.00 and the War Department, Alaska, Department A, item of $173.50. Was that in the fall of the year, those earnings in Alaska? A. Yes.

Q. And Birch and Sonos, $140.29?

A. That is right.

(Testimony of Muriel Firth.)

Q. Similarly true of that item?

A. That is correct.

Mr. Crippen: I will offer in evidence certified copy of the return of Mrs. Firth for the estate of Martin W. Firth.

The Court: So ordered.

Mr. Bergman: Objected to, your Honor, on the ground that insofar as the earnings of the deceased is concerned it is a self-serving declaration on the part of the libelant.

Mr. Crippen: If your Honor please, at our pre-trial at counsel's suggestion—— [13]

The Court: Objection overruled.

The Clerk: Libelant's exhibit 41 in evidence.

(Thereupon the document above referred to was received in evidence and marked libelant's exhibit number 41.)

Q. (By Mr. Crippen): Mrs. Firth, on January 3, or in the month of January, 1949, did you receive from a branch of the Government of the United States what I now hand you and which is marked Libelant's identification number 43? A. Yes.

Q. Will you read the statement here addressed to you?

Mr. Bergman: To this I object, your Honor, until the document is introduced as evidence and admitted.

The Court: What is this?

Mr. Crippen: I will have to inform the Court what it is before it can be admitted, your Honor.

(Testimony of Muriel Firth.)

Mr. Bergman: That is all right.

Mr. Crippen: Your Honor, this is a statement to a letter addressed to Mrs. Firth enclosing a check which is declared to be amount due Martin W. Firth as an employee of the War Department, referring to being aboard the Clarksdale Victory and so forth from the Government.

The Court: What is the purpose of this?

Mr. Crippen: To show that he was an employee aboard the Clarksdale Victory, your Honor.

The Court: No one disputes that. [14]

Mr. Crippen: I understood that was not waived by the Government, although unofficially agreed to.

Mr. Bergman: I stated at the pre-trial, your Honor, that I agreed that two workaways were workaways and went no farther.

The Court: All right, I will accept it.

Mr. Bergman: I should like to object to it, your Honor, on the ground that it is incompetent evidence for the purpose of proving——

The Court: May I see it?

Mr. Bergman: The fact that the workaway was employed by the authority of the respondent——

The Court: By the authority of whom?

Mr. Bergman: By the authority of the Master of the vessel, and that that instrument cannot bind the Government in respect of a contract of employment if made on or about the 22nd of November, 1947.

Mr. Crippen: It is a strange situation when the Government wishes to keep out of evidence their

(Testimony of Muriel Firth.)

own correspondence, officially marked files, and addressed to this libelant.

Mr. Bergman: That instrument, your Honor, was made by the War Department to the widow, at lease I represent this to your Honor at a time when matters of compensation, war risk insurance, things of that matter were being contemplated. [15] It is one thing for the War Department to construe or acknowledge that a person is classed as a certain—classed in a certain manner for compensation or war risk insurance, and entirely a different matter to consider that they are classed as an employee, for example, within the meaning of the Jones Act.

The Court: Well, if they be regarded as a circumstance in the offer of proof. I will allow it.

The Clerk: Libelant's exhibit 43 in evidence.

(Thereupon the document above referred to was received in evidence and marked libelant's exhibit 43.)

Q. (By Mr. Crippen): Mrs. Firth, what was the purpose of your husband going to Alaska?

A. Well, he couldn't find employment in Tacoma and he went up there to get a little money ahead so he could buy a house.

Q. So he could buy a house for you and the baby? A. And for my daughter.

Q. Did you have a conversation with him by radio-telephone prior to his leaving on the Clarksdale Victory? A. Yes, I did.

Q. When was that?

(Testimony of Muriel Firth.)

A. I think it was the Thursday before the boat sailed. I think the boat left Saturday.

Q. What was the nature of that conversation?

Mr. Bergman: Objected to, for the moment, your Honor, [16] as immaterial unless some offer is made with respect to what is shown it would seem to be quite incompetent.

Mr. Crippen: I will change that with a preliminary question.

Q. Did your husband indicate to you at that time any employment in Tacoma causing him to desire to return? A. Yes, he did.

Mr. Bergman: Objected to, your Honor, as wholly incompetent.

The Court: Overruled.

Mr. Crippen: You may answer, Mrs. Firth.

A. He indicated to me that he had received a letter from his father stating that he probably could get into the union whereas he could get employment driving. It was the Teamsters Union.

Mr. Bergman: What union?

A. The Teamsters Union.

Q. (By Mr. Crippen): Was there any statement regarding earnings as compared with his earnings in Alaska?

Mr. Bergman: Objected to, your Honor, if this is a statement of what the father said might happen.

The Court: Objection sustained.

Q. (By Mr. Crippen): Was any statement made by your husband during the conversation re-

(Testimony of Muriel Firth.)

garding the accumulation of earnings or anything of that nature? [17]

A. Well, he just mentioned that he thought he had enough up there—a reasonable amount to put down on a house with the assistance of a Government loan and that he would come back to the States with this, that is all.

Q. Mrs. Firth, since your husband's death, how have you supported yourself?

A. I have been working ever since.

Q. What work are you doing there in Tacoma?

A. Secretarial work.

Q. What are your hours of work?

A. 8:30 until 5:00.

Q. Do you support your baby by Mr. Firth, Barbara Firth? A. Yes.

Q. And who cares for her while you are working?

A. Right now she is in the nursery. She is there all day until I pick her up after work.

Q. You take her there before you go to work and pick her up at night?

A. I take her there in the morning.

Q. Have you received at any time any amount, anything whatsoever from the Government with respect to war risk insurance or anything of that nature? Have you accepted anything whatever?

A. I have never accepted anything.

Mr. Bergman: Objected to as immaterial. [18]

Mr. Crippen: Those matters are considered by

(Testimony of Muriel Firth.)

the Court in the event of a judgment in determining what, if anything, has been received.

Mr. Bergman: They ought not to be considered, your Honor.

The Court: Has she received any money from the Government at all in connection with the loss of her husband?

Mr. Crippen: That was my question.

Q. Have you? A. No.

Q. You have received nothing?

A. Nothing.

Q. Mrs. Firth, have you remarried since the death of your husband? A. No, I have not.

Q. Have no contemplation of any remarriage?

A. No, not at the present.

Q. Mrs. Firth, did your husband during his lifetime make every effort to support you and to contribute toward the support of yourself and baby?

A. To the best of his ability.

Mr. Bergman: Objected to as conclusion, your Honor. The facts will speak for themselves.

The Court: That probably is a conclusion.

Q. (By Mr. Crippen): Did he while employed and from funds [19] he received of any nature support you and your baby? A. Well——

Mr. Bergman: Objected to, your Honor, for the same reason, that that is vague, asks for a conclusion of what the facts are.

Q. (By Mr. Crippen): Did he bring his money home, pay the bills? A. Of course.

Q. For yourself and baby? A. Yes.

(Testimony of Muriel Firth.)

Q. Was there any other purpose in his going to Alaska other than to get funds to support you and the child? A. No.

Mr. Bergman: That is leading.

The Court: Overruled.

Q. (By Mr. Crippen): Mrs. Firth, was your husband—what was the state of your husband's health? A. He was in perfect health.

The Court: How old was he at the time of his death?

Q. (By Mr. Crippen): At the time of his death, Mrs. Firth, what was your husband's age?

A. I believe he had just turned 22.

Q. He was 22 one week before his death?

A. I believe that is right.

Q. And your age at that time was what? [20]

A. 20.

Q. What is the condition of your health, Mrs. Firth? A. I am in good health.

Q. Very good? A. Uh-huh.

Q. Were you and your husband affectionate and looking towards the future, planning your family, or had there been any difficulty? Was the home a strong one, your bond and relationship between yourself and your affection for him?

A. I thought it was, yes.

Mr. Crippen: I think that is all.

The Court: Are there any questions by counsel for the Government?

Mr. Bergman: Yes, your Honor. I anticipate

(Testimony of Muriel Firth.)

that they might be some length. I would suggest that we commence this afternoon.

The Court: We will resume, then, at 2:00 o'clock.

(Thereupon Court was recessed until 2:00 o'clock p.m.)

CERTIFICATE OF REPORTER

I, Joan Perkins, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 21 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ JOAN PERKINS. [21]

Friday, March 30, 1951. 2:00 P.M.

The Court: You may cross-examine the lady.

Mr. Crippen: Mrs. Firth, will you take the stand?

MURIEL FIRTH

plaintiff herein, resumed the stand and being previously sworn, testified further as follows:

Cross-Examination

By Mr. Bergman:

Q. Miss Firth, I understood you to say you were born in the East. Was it Chicago?

A. Chicago.

Q. And lived there about how long?

(Testimony of Muriel Firth.)

A. About eighteen years, nineteen.

Q. You attended school there? A. Yes.

Q. Are your parents now living?

A. My mother is.

Q. Your father?

A. My father is deceased.

Q. Passed on? About when did you meet Martin Firth, your deceased husband?

A. In about June or July of 1945.

Q. He was then in the Army, was he?

A. Yes, he was stationed at Fort Sheridan, Illinois, in the [2*] Army.

Q. Then where was he released from the Army?

A. He was released at Fort Lewis, Washington.

Q. Do you know approximately when he was transferred to Fort Lewis?

A. Oh, I would say in October, I think, September or October; I am not sure.

Q. Did you move to Tacoma then for the purpose of the marriage?

A. He asked me to come out to Tacoma to get married, yes.

Q. You came to Tacoma alone? A. Yes.

Q. Your mother staying in the East, is that right?

A. That is right. My folks stayed East.

Q. You were married—was it on the 14th of December, 1945? A. The 13th.

Q. 13th of December, 1945?

A. That is right.

(Testimony of Muriel Firth.)

Q. And Mr. Firth was discharged a few days later?

A. He was discharged earlier, a week earlier.

Q. Oh, a week before that? You were married a week after he got out of the Service?

A. That is correct.

Q. Were his parents then living? A. Yes.

Q. Were they then living at the time of your marriage—where [3] were they living?

A. In Tacoma, 1623 East 61st Street, Tacoma, Washington.

Q. Where did you and your husband live immediately after your marriage?

A. We had an apartment and we lived on 11th, and I can't tell you the exact address—11th and G Street, in Tacoma.

Q. You moved there how long after you were married? A. Oh, a couple of days after.

Q. Just a couple of days? A. Yes.

Q. How long did you live there?

A. Until May. I went back to Chicago in May. My dad died and I left and went back to Chicago.

Q. You lived at the address to which you moved when you were married from the time of the marriage until May of 1948? A. No, 1946.

Q. Oh, May, 1946. A. Yes.

Q. I believe you stated your husband worked in a shipyard early in '46?

A. Yes, I believe that is correct.

Q. He went to work there either the last day of 1945, or the first day of 1946, didn't he?

A. Yes, beginning of the year.

(Testimony of Muriel Firth.)

Q. And left that employment on the 6th of February, is that [4] correct?

A. I don't know exactly when, but he left there not too—you know, within a reasonable length of time.

Q. Well, he worked there about a month?

A. I guess that is right.

Q. Then, if you recall, where did he next work?

A. I think he started for either the Union Taxi Company or Tacoma Drug Company, either of them.

Q. Would it be true he commenced to work for the Tacoma Drug about the 2nd of March?

A. Could be, yes.

Q. And worked until the 23rd of March?

A. I guess so. I couldn't tell you offhand.

Q. Would that be about right?

A. I imagine.

Q. Would it be true that he earned approximately $100 during that period of time?

A. I can't remember that far back.

Q. Do you remember, then, where he next went to work after he left the Tacoma Drug?

A. Well, I think after that it was—it must have been the Union Taxi Company.

Q. Where was the Union Taxi Company located? Tacoma? A. In Tacoma.

Q. He worked there, didn't he, just from the 14th of April [5] till the first of May?

A. That is right.

Q. And during that time he earned $100 a month?

A. I guess so. I don't know. I imagine.

(Testimony of Muriel Firth.)

Mr. Crippen: If you don't know, Mrs. Firth, just answer that, if you don't recall.

A. All right.

Q. (By Mr. Bergman): Do you know whether or not your husband, Mr. Firth, contributed to your support during those first four months of the marriage? A. Oh, yes, definitely.

Q. Do you know how much?

A. Well, he gave me whatever he made.

Q. Were you working then?

A. For four months, yes.

Q. At the time of the marriage you were working? A. No.

Q. What occasioned the move to Chicago?

A. My dad passed on.

Q. The death of your father? A. Yes.

Q. What is business, or employment, if any, at the time of his death? A. My father's?

Q. Yes. [6]

A. He was a meat cutter—butcher.

Q. Then you went to Chicago and stayed how long?

A. I think until the end of September, October.

Q. 1946? A. That is right.

Q. Mr. Firth didn't work in Chicago, did he?

A. No, he came out there merely to help me move back to Tacoma. We were intending to stay out here.

Q. And you got back here in September?

A. Well——

Q. Approximately?

A. Approximately September or October, first part of October.

(Testimony of Muriel Firth.)

Q. From September until the end of the year Mr. Firth didn't work, did he?

A. Well, now, I wouldn't say he did. I don't think so. I don't recall.

Q. Actually, then, in the calendar year, 1946, he didn't earn over $350 did he?

A. Well, besides his Government compensation that he got. I mean, at that time there was no employment to be had unless you were skilled, a professional man, and there was just no opportunities at that time.

Q. But I say he didn't earn over $350, did he, in 1946? A. That is right. [7]

Q. Referring to the income tax return which you prepared for 1947, libellant's Exhibit No. 41, there are five items of income apparently made by your husband. Outside of that, of what he earned in Alaska, would those, according to the information, represent all the sums he earned for that year?

A. Yes.

Q. In other words, everything that he earned in 1947 is stated on his 1947 income tax return?

A. That is right.

Q. I believe you stated your husband went to Alaska in June of 1947? A. That is right.

Q. For the reason that he didn't indicate employment in Tacoma?

A. There was no employment for an unskilled person and he went up there to get enough money to buy a house.

Q. Where were you living at that time?

(Testimony of Muriel Firth.)

A. I was living in Tacoma. I don't know the exact address. I think it was 1205 East Sixty Second, Tacoma.

Q. That is, at the time of your husband's departure for Alaska? A. Well, we moved——

Q. Perhaps I had better go back, if I may, Mrs. Firth, to the time you returned to Tacoma from Chicago. You returned to Tacoma in September, 1946? [8] A. Yes.

Q. With your husband? A. Yes.

Q. Where did you live then when you got back?

A. Maybe that was the address—I know we moved right before he went up to Alaska to a different address.

Q. Didn't you live in a housing project there in Alaska—I mean in Tacoma?

A. In Tacoma after he had died.

Q. That was 81 Prosser Street?

A. That is correct.

Q. When did you move there?

A. May of the following year.

Q. May following the death of your husband?

A. Let's see, the following May. He died in November, so it was the following May.

Q. Where did you go when you got back to Tacoma with your husband after returning from Chicago, where did you live then?

A. I think it was either at 61st Street or 60th Street, I don't recall.

Q. Do you recall the address?

A. No, I don't.

(Testimony of Muriel Firth.)

Mr. Crippen: If your Honor please, I think it is rather immaterial. [9]

The Court: Counsel may have some purpose.

Q. (By Mr. Bergman): Well, I will ask then what type of dwelling was it at which you then moved, an apartment house or what type of home?

A. When he went up to Alaska?

Q. When you returned to Tacoma from Chicago.

A. Oh, it was a pretty nice home. I mean it was——

Q. A separate house? A residence dwelling?

A. It was a residence dwelling, that is correct.

Q. How many rooms? A. Oh, about five.

Q. You were renting then?

A. No, we were intending to buy.

Q. When you moved into it, did you rent it?

A. No, my mother gave us enough money for the down payment and we intended to go on from there paying the rent.

Q. Do you recall when that was you moved into that house?

A. In about the end of October or November.

Q. October or November, 1946?

A. That is right.

Q. How much were the monthly payments to be made following your making the down payment, as near as you recall?

A. About $50, approximately, a month.

Q. From the time of your return to Tacoma from Chicago until the time your husband went to Alaska, that is, from about [10] September, 1946,

(Testimony of Muriel Firth.)

until about June, 1947, what is your estimate of the amount of money which Mr. Firth contributed to your support? A. I can't estimate.

Q. Did he——

A. (Interposing): Whatever he made he gave to me.

Q. Did he smoke?

A. Did he smoke? Yes.

Q. Take an occasional drink now and then?

A. That is right.

Q. What is your estimate as to how much money would be spent, for example, for liquor and cigarettes during this time?

A. It would be a small amount. He didn't have that much to spend on anything like that.

Q. Did he smoke as much as a package of cigarettes a day? A. Approximately.

Q. As many as one pack?

Mr. Crippen: Your Honor, please, I object to this line of questioning. I think it is improper and getting too infinitesimal.

The Court: Overruled, sir.

Q. (By Mr. Bergman): If you recall, did your husband smoke as much as two packages of cigarettes a day?

A. No, I would say about a package.

Q. Would you say as much as $25 a month were spent for, say, [11] liquor and cigarettes?

A. I wouldn't say, I don't know.

Q. Your husband was obviously unable to take

(Testimony of Muriel Firth.)

care for your support out of his income alone, wasn't he?

A. Well, he was unable to if he didn't have a job, he couldn't get a job.

Q. I just mean the fact in itself, Mrs. Firth, that he did not, regardless of the cause, support you entirely? A. That is right.

Q. There must have been other sources of support, surely? That is true, isn't it? A. Yes.

Q. Then in September of 1947, Mr. Firth went to Alaska in order to save up some money, I believe you said?

A. In June he went to Alaska.

Q. In June, 1947?

A. I believe that is right.

Q. He later told you on the telephone, before starting to come back, he thought he had enough money to make a down payment on a house?

A. Yes.

Q. Where were you living then at that time when he commenced his return back to the United States?

A. Well, it wasn't at that other address, because we had moved—it was either at—I don't know—14- or 1601-62nd. [12]

Q. Were you still living in the house?

A. Not the same house.

Q. The house on which your mother had made a down payment? A. No.

Q. You had moved? A. Yes.

(Testimony of Muriel Firth.)

Q. How much of a down payment did she make, if you recall?

Mr. Crippen: I object to that as immaterial, what her mother may have done.

The Court: Overruled.

Q. (By Mr. Bergman): Do you recall approximately how much? A. About $900.

Q. About $900? While he was in Alaska did your husband send you down any money from time to time? A. I didn't ask him to.

Q. Was it for that reason that he didn't?

A. That is right. I took on a job myself at that time, and I figured he probably needed all he earned up there to get along on and save for a house, and I was doing all right down here.

Q. It was because of the fact that living expenses are very high in Alaska that you assumed he would need all the money he earned himself?

A. That is right.

Q. Do you recall now what assets were listed in the estate, [13] probate proceedings of your husband?

A. There were no assets. There was no insurance.

Q. No insurance, no cash, no nothing?

A. No.

Q. You commenced to work, yourself, in the Tacoma Metal Products in June of 1947?

A. That is right.

Q. And your baby was then about——

A. Six months.

(Testimony of Muriel Firth.)

Q. Six or seven months old? She was born in November, 1946? A. That is right.

Q. At the time of the birth of your baby, where were you then living?

A. At the previous address on 61st, I think it was.

Q. On 61st Street? A. Yes, I think so.

Q. In Tacoma? A. Yes.

Q. Do you recall the number?

A. I think it was 1205. I am not sure.

Q. Do you recall what the cross street might have been, if that number is wrong?

A. No. It was about three blocks off of McKinley, is all I could tell you.

Q. This is the home on which your mother had made the down [14] payment?

A. That is right.

Q. Who was there living in the home in addition to yourself at that time? This is at the time of the birth of your baby.

A. My mother and my husband.

Q. How long, then, did you continue to live at that place, Mrs. Firth?

A. Until that May, of 1947.

Q. Until the following—until May, 1947?

A. That is right.

Q. Where did you then move?

A. It was on the 62nd Street address. It was just about a block away.

Q. And you lived there how long?

A. A year.

(Testimony of Muriel Firth.)

Q. May, 1948, to May, 1949? A. Yes.

Q. And then where did you live?

A. We moved to the housing project.

Q. Housing project? A. Yes.

Q. On what date, approximately?

A. I think it was the following May.

Q. Then we would be getting into May of 1949?

Mr. Crippen: 1948. [15]

A. I don't know. About that, I guess.

Q. (By Mr. Bergman): Couldn't it be, Mrs. Firth, you moved into the housing project in April or May of 1947—1948, just some about four months following the death of your husband?

A. Well, what did you say? In April or May?

Q. Yes. Isn't it true it was only three or four months, which would put you to April, say, of 1948, that you moved into the housing project?

A. It is possible. I couldn't remember offhand. They are all very closely related dates.

Q. Well, you can recall whether or not it was some four months following the death of your husband that you moved into the housing project?

A. It must be.

Q. That would be correct?

A. It would be correct, I guess.

Q. Then who moved into the housing project with you?

A. My mother and my brother-in-law moved in with me.

Q. What is his name? A. Eugene D. Firth.

Q. How old a man is he?

(Testimony of Muriel Firth.)

A. He is younger than I am. A year younger than I am.

Q. How long did you continue to live there? Is it correct—excuse me—is it correct to refer to it as a housing project? A. Yes. [16]

Q. What type of family accommodation was it? How many rooms, and so forth?

A. There was a living room, dinette, and two bedrooms.

Q. Is it quarters in a large building?

A. No, they are individual—oh, this was a duplex.

Q. A duplex? A. Yes.

Q. How long, as well as you remember, did you live there?

A. If I moved there in May, I stayed there a year.

Q. Then you would have moved out in May, 1949? A. That is right.

Q. Do you recall what the rental was there?

A. $25.

Q. Then to where did you move in May of 1949?

A. I moved to my present address, 305 Stanford Street.

Q. Who else, if anyone, lives there with you now? A. The same parties.

Q. Your brother-in-law, Eugene Firth, lives there? A. Yes, he is.

Q. Does he contribute in any way to the support of the home?

Mr. Crippen: Your Honor please, I renew my

(Testimony of Muriel Firth.)

objection, particularly, for the record here. This is entirely immaterial, counsel's questions.

Mr. Bergman: I understand the rule to be, your Honor, that sources of other income are one factor to consider in the [17] award.

Mr. Crippen: Her present income is immaterial.

The Court: Her present income would be immaterial, counsel. The factors concerned are his earning capacity, his ability to provide for this lady, and the surrounding facts and circumstances are relevant and material; but her present means and sources of income, I can't see at this time would aid the Court in making a determination at all in making an award.

Mr. Bergman: Very well, your Honor.

Q. Had Eugene Firth helped out in your expenses in any way prior to the death of your husband?

A. No. He wasn't even in Tacoma at that time.

Q. Do you know where he was? A. Yes.

Mr. Crippen: I object on the ground, immaterial where her husband's brother might have been prior to her husband's death.

The Court: Overruled.

Q. (By Mr. Bergman): Do you know where he was?

A. Yes, he was in the Navy down in San Diego or San Francisco here.

Q. At the time of the death of your husband?

A. Yes. Well, at the exact time of death he was

(Testimony of Muriel Firth.)

just, had been discharged about two or three weeks from the Navy. [18]

Q. At the time of the death of your husband?

A. Yes.

Q. He had been discharged from the Navy and moved back to Tacoma? A. Yes.

Q. I understood you to say, Mrs. Firth, that at the time your husband went up to Alaska, that you had a conversation with him about the purpose of his going up, is that right? A. Yes.

Q. He was going up to try to get money to make this down payment? A. That is right.

Q. At the time, based upon the help which Mr. Firth had been able to provide you, had you determined that something would have to be done about money matters or you just couldn't get along?

A. That is correct.

Mr. Crippen: I object on the ground the question is argumentative, your Honor, and not proper examination or cross-examination.

The Court: Overruled.

Q. (By Mr. Bergman): It was this fact that he had had a very hard time earning some money in Tacoma which caused him to go?

A. That is right.

Q. Was anything said about how long he would be there? [19]

A. All he said, he would be up there and just as soon as he would get enough money he would be back. He didn't determine how many months or years it would take.

(Testimony of Muriel Firth.)

Q. Nothing was said about how long it would take?

A. No, nothing was said about the time.

Q. Did you discuss how much money he would try to get together?

A. Well, reasonable amount for a down payment.

Q. Enough for the down payment?

A. Yes, and a little bit to carry us through until he would find employment down here.

Q. Would it be fair to say he went up to see if he could get together a thousand dollars or so?

A. I would say $1,000, $1,500.

Q. Had you, at that time, Mrs. Firth, stated to your husband in effect that if he couldn't get out and earn some more money you didn't think you could continue the marriage relation any more?

A. I never said that to anybody, no.

Q. You never at any time suggested that to him?

A. There was no reason to.

Q. But, unfortunate as the fact may be, he just simply was unable to support you, isn't that true?

A. It was impossible at that time, yes.

Mr. Bergman: I think that is all, your [20] Honor.

The Court: All right.

Mr. Crippen: That is all.

The Court: The witness is excused?

Mr. Crippen: Yes, your Honor.

The Court: Thank you.

(Witness excused.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 21 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK. [21]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents are the originals, or true and correct copies of the originals, filed in this Court in the above-entitled case, and that they constitute the apostles on appeal herein as designated by the proctors for the appellant, with the exception of the reporter's transcript, which is not on file:

Seaman's Administratrix libel in personam.

Answer.

Opinion.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Order extending time to docket apostles on appeal.

Respondent's designation of apostles on appeal.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 3rd day of September, 1952.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals, or true copies of the originals, filed in the above-entitled cause, and that they constitute a supplement to the apostles on appeal herein as designated by the proctors for the appellant:

Copy of motion to vacate judgments and for dismissal of libels.

Copy of order denying motion to vacate judgments and to dismiss libels.

Assignment of errors.

Appellant's supplemental designation of apostles on appeal.

Libelant's Exhibits 32 to 43.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 10th day of September, 1952.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the accompanying documents, listed below, are the originals filed in the above-entitled cause and that they constitute a supplement to the apostles on appeal herein as designated by the proctors for the appellant:

Reporter's transcript, direct examination, Muriel Firth.

Reporter's transcript, cross-examination, Muriel Firth.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 14th day of October, 1952.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13524. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Muriel Firth, Administratrix of the Estate of Martin W. Firth, deceased, Appellee. Apostles on Appeal, Supplemental and Second Supplemental Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Apostles on Appeal filed September 3, 1952.

Supplemental filed September 10, 1952.

Second Supplemental filed October 14, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13524

Excerpt from Proceedings of Monday, October 6, 1952.

Before: Stephens, Healy and Pope,
Circuit Judges.

ORDER SUBMITTING AND GRANTING MOTION TO MAKE NEW PROOFS, ETC.

Ordered motion of appellant to make new proofs under Rule 38 of the Rules of this Court presented by Mr. Keith Ferguson, Special Assistant to the Attorney General, proctor for appellant, and by Mr. Wm. J. O'Brien, proctor for appellee, and submitted to the court for consideration and decision.

Upon consideration thereof, Further Ordered that said application be, and hereby is granted, and that the proffered documents consisting of authenticated documents of the Bureau of Employees Compensation, Federal Security Agency be, and hereby are filed as a supplemental apostles on appeal, with leave to counsel for appellee to object to consideration of said documents on the hearing of the cause on the merits.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,524

UNITED STATES OF AMERICA,
Appellant,

vs.

MURIEL FIRTH, Administratrix of the Estate of MARTIN W. FIRTH, Deceased,
Appellee.

APPELLANT'S STATEMENT OF POINTS TO BE RELIED ON ON APPEAL AND DESIGNATION OF PORTION OF RECORD TO BE PRINTED

Appellant adopts as points on appeal the assignment of errors included in the Apostles on Appeal on file herein.

Appellant designates for printing the entire Apostles on Appeal as designated by the appellant on file herein, except that by stipulation on file herein the exhibits need not be printed and may be considered by the Court in their original form.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ LEAVENWORTH COLBY,

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General, Proctors for Appellant, United States of America.

[Endorsed]: Filed October 15, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated and agreed by and between appellant and appellees, acting by and through their respective proctors, that in order to save further cost of printing on exhibits heretofore admitted in evidence herein, said exhibits need not be printed and may be considered by the Court in their original form.

Dated this 14th of October, 1952.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ LEAVENWORTH COLBY,

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General, Proctors for Appellant, United States of America.

/s/ SAMUEL L. CRIPPEN,

/s/ CREIGHTON C. FLYNN,

/s/ WILLIAM J. O'BRIEN,
Proctors for Appellee, Murial Firth, Admx. of Estate of Martin W. Firth, Deceased.

ORDER

So ordered:

/s/ WILLIAM DENMAN,
Judge, U. S. Court of Appeals
for the Ninth Circuit.

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,
Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed October 16, 1952.

NO. 13524

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

MURIEL FIRTH, Administratrix of the Estate of MARTIN W. FIRTH, *Deceased*

On Appeal from the United States District Court for the Northern District of California, Southern Division

---

BRIEF FOR THE UNITED STATES

WARREN E. BURGER,
Assistant Attorney General,

CHAUNCEY F. TRAMUTOLO,
United States Attorney,

LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,
Attorneys for the United States.

INDEX

CITATIONS

CASES:

Page

STATUTES:

MISCELLANEOUS:

In the United States Court of Appeals for the Ninth Circuit

No. 13524

UNITED STATES OF AMERICA, *Appellant*

v.

MURIEL FIRTH, Administratrix of the Estate of MARTIN W. FIRTH, *Deceased*

On Appeal from the United States District Court for the Northern District of California, Southern Division

---

BRIEF FOR THE UNITED STATES

JURISDICTION

Jurisdiction of the District Court rests upon the Suits in Admiralty and Public Vessels Acts (46 U.S.C. 771-779, 781-790) by reason of a libel filed May 26, 1949, to recover for alleged wrongful death on November 24, 1947.

This Court's jurisdiction rests upon 28 U.S.C. 1291 by reason of a notice of appeal filed June 5, 1952, from a final judgment entered March 10, 1952.

QUESTION

The decedent was a civilian employed by the United States as a workaway in the capacity of an ordinary seaman on an Army transport. He lost his life in the service of the vessel leaving a dependent widow and infant daughter. The widow collected his wages as a government employee and applied for and obtained an award of cash compensation and burial allowance under the Federal Employees' Compensation Act on the ground that he met his death while employed by the United States. Thereafter she brought the present libel for wrongful death, alleging that he was employed as a member of the crew, and returned the Treasury checks issued to her pursuant to the compensation award. A single issue is presented:

Whether a workaway employed by the United States as a member of the civilian crew of a military transport is a civilian employee of the United States, the exclusive recovery for whose death in the service of his ship is under the Federal Employees' Compensation Act.

STATUTES

The pertinent provisions of the Federal Employees' Compensation Act of 1916, as amended, and of the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, are set forth in the Appendix A, infra, pp. 27-29.

STATEMENT

This is an appeal by the United States from a $15,000 judgment (R. 24) in favor of libelant, the widow of a civilian workaway employed by the United

States in the capacity of an ordinary seaman who was killed in the service of his ship, the United States Army Transport CLARKSDALE VICTORY, a public vessel in the military service. The court below rejected (R. 31) the Government's defense (R. 9) that compensation was exclusive and its motion to vacate the judgment and dismiss the libel for failure to state a cause of action because of the exclusive character of the libelant's rights as a beneficiary of the Federal Employees' Compensation Act (R. 27). The court held the United States liable because it concluded that the death of the decedent was caused by the unseaworthiness of the Army Transport and its negligent navigation by those in charge of it (Concl. II, R. 22).

For the purpose of this appeal, the Government does not contest the finding of unseaworthiness and negligence. The errors relied upon by the Government arise exclusively from the holding of the court below (R. 31) that civilian workaways employed by the United States in the capacity of ordinary seamen on military transports are not civilian employees of the United States, the exclusive remedy for whose death in the service of their ship is under the Federal Employees' Compensation Act.

The facts of decedent's employment which give rise to the problem are not disputed. Throughout this lawsuit libelant's decedent was recognized by the pleadings and proof of both parties to be a civilian workaway employed by the United States at wages of one dollar per day plus quarters and subsistence and assigned to duty in the capacity of an ordinary seaman, the regular wages for which position were at the

rate of $150 per month and not at the rate of $30 at which decedent was hired. The libel alleged that the vessel was operated by the United States and "that said Martin W. Firth, deceased, at all times herein mentioned was employed on and aboard said vessel as a seaman" (R. 4). Although this allegation was admitted by the Government's answer (Art. IV, R. 7), and further proof was unnecessary, libelant offered as evidence of decedent's employment by the Government as a crew member aboard the Army Transport CLARKSDALE VICTORY, the certificate of settlement issued in favor of libelant for decedent's final pay account (Exhibit 43, R. 47-49, Appendix B, *infra,* p. 30). This settlement certificate contains the express administrative finding of fact that the wages were "due Martin W. Firth, as an employee of the War Dept.—(now Department of the Army), Transportation Corps, USAT "CLARKSDALE VICTORY." The court below found accordingly that libelant's decedent "was a civilian in the employ of respondent (United States) as a seaman, to wit, a work-away" (Fdg. I, R. 17-18).

This finding, based on the wage settlement and the allegations and admissions of the pleadings, which establish beyond doubt that decedent was a civilian seaman employed aboard the "CLARKSDALE VICTORY" by the Army Transportation Corps, Water Division, is further confirmed by the various documents in libelant's claim file furnished by the Bureau of Employees' Compensation and received in evidence by this court (R. 75). These compensation documents further show not only that libelant applied for and was awarded

compensation under the Federal Employees' Compensation Act on account of the death of her husband in the performance of his duty as a civilian employee of the United States, but further show that the Army paid $491.15 for his funeral expenses as such a civil service employee killed in the performance of duty (Photostat 43) and later paid a further interment allowance of $75 (Photostat 25), and that so far as appears these sums were never returned to the United States.

A claim for Federal Employees' Compensation for libelant and for her infant daughter was submitted by libelant on Compensation Form CA-5 (Photostats 83-86). An accompanying letter, dated October 22, 1948 (Photostat 35, Appendix C, *infra,* p. 32), from libelant's attorneys, Messrs. Crippen & Flynn, who appeared for her both before the Compensation Bureau and in this litigation, advised that their client was filing this suit against the United States under the Jones Act and was also claiming $5,000 War Risk Insurance from the Army, but that libelant did not wish to "accept" compensation benefits at that time. The attorneys' letter also forwarded Form CA-42 (Photostats 19-20) claiming additional burial allowance and stated that the undertaker would handle any further correspondence on that matter. The Bureau replied to the attorneys under date of November 30, 1948 (Photostats 33-34) that the claim which they submitted was in order and libelant was entitled to payment of compensation, but that, if she had elected to receive the War Risk Insurance from the Army, the terms of the war risk policy and regulations required

that compensation payments had to be withheld until the amount of such withhholding equalled the amount paid as War Risk Insurance.

After several further exchanges of correspondence between libelant's attorneys and the Bureau of Employees' Compensation (Photostats 28-29), the Bureau appears to have concluded that although libelant was declining compensation for herself and might elect to receive War Risk Insurance, the infant daughter's right to receive compensation was not impaired. Accordingly, under date of July 13, 1949, the Bureau wrote to libelant advising her that an award of compensation had been made to the child alone, but not to libelant, and that checks for the amount due the child under the award were being mailed (Photostat 9, Appendix D, *infra,* p. 34). The Treasury checks for the cash compensation payments due the infant daughter were returned by libelant's attorneys, as was the check for burial allowance awarded pursuant to the claim on Form CA-42 (Photostats 13, 8, 4).

It is thus undisputable that libelant has not been "paid" (i.e., has not retained), either for herself or for her daughter, any amount under the compensation award or under the War Risk Insurance (Fdg. VIII, R. 21-22). But the evidence is equally clear and undisputable that every Government agency called upon to determine the facts held libelant's decedent to be a civil service seaman employed by the United States and entitled to wages and every other right of such a civilian employee.[1] The court below, in line with the

---

[1] The compensation now accrued under the award is stated in a letter from the Compensation Bureau, Appendix E, *infra,* p. 36.

undisputed evidence, found as a fact that: "Martin W. Firth, deceased, was a civilian in the employ of respondent as a seaman, to wit, a workaway, and was upon and aboard the United States Army Transport (U.S.A.T.) CLARKSDALE VICTORY, a vessel owned and operated by respondent when said vessel ran aground, stranded and broke up" (Fdg. I, R. 17-18).

Nonetheless, the court below expressly held decedent was a passenger and not a civilian employee in the order denying the Government's motion to vacate the judgment and dismiss the libel. The order states (R. 31):

> The court observes that two of the libelants in the instant case were not civil service employees on a Government vessel, but were workaways utilizing the CLARKSDALE VICTORY as a means of transportation from Alaska to the United States. The Supreme Court ruling [in *Johansen* v. *United States,* 343 U. S. 427, rehearing denied 344 U. S. 848], as we view it, does not hold that such workaways are covered exclusively by the Federal Employees' Compensation Act.

Because of the serious repercussions of the holding of the court below, it was necessary for the United States to appeal this decision in order to settle the status of civilian workaways employed by the United States on vessels of the Military Sea Transportation Service, the present successor of the Army Transport Service. The present case was selected for appeal and the other cases amicably adjusted, because a single case is believed to be sufficient to decide the question

and the record in the present *Firth* case most clearly shows the facts regarding the status of the decedent as a civil service seaman employed by the United States.[2]

SUMMARY OF ARGUMENT

I. As a workaway libelant's decedent was not a passenger but an employee of the United States as operator of the public vessel involved, and as such was a civilian crew member. Textbooks and decided cases are alike unanimous that a workaway is a seaman of the vessel on which he is employed and has all the rights and duties of any seaman and crew member.

The court below nowhere explains its reasons for departing from the established law. The court apparently thought decedent's wages of $30 a month, plus quarters and subsistence, were so nominal as to make him a "paid" instead of a "paying" passenger. But for compensation benefits, decedent's pay was taken at the established rate for the position in which he was serving and, in any event, his wage of $30 per month far exceeds the rates of twenty-five and thirty cents per month which were paid workaways in previous cases holding them to be seamen and not passengers.

Finally, libelant alleged and respondent admitted, that decedent was a seaman and member of the crew of the public vessel involved, and, after the court below had so found, it would seem that the law and facts of

---

[2] This is so because only in the *Firth* case did the libelant both file claim and obtain an award of compensation and also bring suit under the Jones Act, so that a full record is available to this Court on both aspects of the question.

the case were established in that sense unless the court below were to reopen the case and refind the facts.

II. Libelant's decedent was a civilian employee of the United States, the exclusive right for whose service-incident death was under the Federal Employees' Compensation Act. Every civilian employed by the United States, unless expressly excluded by some special statute, is within the coverage of the Act. *Johansen* v. *United States,* 343 U.S. 427, rehearing denied, 344 U.S. 848. The applicable civil service regulations expressly provided with respect to the Army Transport Service that all employees on transport ships are employees in the unclassified civil service exempt from examination; the sole exception being the officers and certain others, who are in the classified and competitive civil service.

The Supreme Court settled in *Johansen, supra,* that the Compensation Act "is the exclusive remedy for civilian seamen on public vessels" (at. p. 441). Indeed, it expressly declared that whenever the Government has created any "comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect" (*id.* 441). The court below applied this rule to Veterans' Compensation in *Pettis* v. *United States,* (N.D. Calif., 1952) 108 F. Supp. 500. It is not believed that the court meant to depart from that rule in this case, but would have dismissed the libel except for its doubts as to the status of workaways as seamen. This Court should accordingly order the dismissal now.

III. Dismissal of the libel on the ground that compensation is exclusive was contemplated by Congress and will allow libelant a larger ultimate recovery than her $15,000 judgment. Libelant's compensation rights are worth $37,283.17, or over twice as much as her judgment. They are worth over three times as much, after deduction of the standard twenty percent attorneys' fee of 28 U.S.C. 2678, as a result of which libelant would obtain $12,000 and her attorneys $3,000 from the judgment.

Congress in section 303(g) of the Compensation Act Amendments of 1949 (5 U.S.C. (Supp. V) 757 note) contemplated that compensation would eventually be held by the Supreme Court to be exclusive and has expressly provided that claimants, like libelant here, shall have one year from the dismissal of their lawsuits within which to claim their compensation rights. There is therefore every reason why this Court should apply the *Johansen* rule and order the libel dismissed for failure to state a cause of action.

ARGUMENT

I.

As a Workaway Libelant's Decedent Was Not a Passenger But Was a Seaman and Member of the Crew Employed by the United as the Operator of the Vessel Involved.

The court below was clearly in error when it held, as a matter of law and contrary to its own finding of the facts, that decedent was not an employee of the United States as operator of the ship but as a workaway was merely a passenger (Cf. R. 31). The general understanding that a workaway is a seaman employed as a member of the crew and not a passenger

utilizing the vessel as a means of transportation is exemplified by the definition in De Kerchove, *International Maritime Dictionary* (1948):

> WORKAWAY. Slang term to denote a person who works his passage on a ship, as distinguished from a stowaway. The workaway is a seaman and a member of the crew. He signs articles.

It is similarly stated in 2 Norris, *Law of Seamen* (1952) § 654, p. 316:

> A workaway is a stranded or repatriated individual, who signs the articles and agrees to perform some services in exchange for his transportation—invariably for wages at a nominal amount. By signing the articles and becoming a member of the ship's company and being engaged on a vessel in navigation and doing work of a maritime nature he is a seaman, and when injured by reason of his employer's negligence he has a Jones Act remedy. [Citing *The Tashmoo* (E.D.N.Y., 1930) 48 F. 2d 366; *Buckley* v. *Oceanic S.S. Co.* (9th Cir., 1925) 5 F. 2d 545.]

The contrary holding of the court below that workaways are not seamen employed as members of the crew, but instead are mere passengers, so that libelant's decedent was only "utilizing the CLARKSDALE VICTORY as a means of transportation" (R. 31, *supra,* p. 7) stands alone against every other know decision.

Dozens of unreported cases, both against private operators and against the Government in WSA/NSA operations have treated workaways as seamen and

members of the crew for the purposes of suits for Jones Act negligence, for seaworthiness, and for maintenance, cure and wages, without the question of their seaman's status ever being doubted. See e.g. this Court's decision in *Buckley* v. *Oceanic S.S. Co., supra.* Indeed, the only cases finding it necessary to discuss so obvious a question as the status of a seaman employed as a workaway dealt with questions of salvage and imprisonment. In *The Tashmoo, supra,* (48 F. 2d at 368) the court observed, "The advocates for libelant contend that, because of the small [thirty cents per month] salary paid and the condition of libelant's employment, he may be considered for the purpose of a salvage award as a passenger, but such contention cannot be sustained; on the contrary he was a seaman." Again, in *Dick* v. *United States Lines Co.* (S.D. N.Y., 1941) 38 F. Supp. 685, the court held that, as a workaway, plaintiff "was in the employ of the vessel's owners as a member of the crew" and that "as such, he was subject to proper discipline."

In the present case, the reasons of the court below for the contrary holding, that a workaway is not employed as a seaman but is a passenger merely utilizing the vessel as a means of transportation, are nowhere explained by the court. It may be because decedent, although assigned to duty as an ordinary seaman, the pay for which was then at the base rate of $150 a month or $1,800 per year, was employed as a workaway at the nominal wage of $1.00 per day or $30 per month, that the court thought he should be regarded as something new—a "paid" instead of a "paying" passenger. But this same argument had

been presented and rejected in the *Buckley* and *Tashmoo* cases. Yet decedent's wages as a workaway in this case, while only $30 per month, as compared with $150 full ordinary seaman's wages, were proportionately many times greater than the token wages of twenty-five cents per month paid in *Buckley* and thirty cents per months paid in *The Tashmoo* at a time when ordinary seamen were paid about $30. Moreover, in computing the death compensation payable to libelant, the full ordinary seaman's rate of $1,800, plus subsistence valued at $192 and quarters at $60 applied and was employed.

In summary, we believe that the decision below, the rationale of which would deprive workaways employed on private merchant vessels of the protection of the Jones Act and of the seamen's traditional right to maintenance and cure and would limit them to the inferior rights of passengers, is so undesirable a departure from the established law, the privileged treatment of which seamen enjoy as wards of the admiralty judges, that it must be rejected by this court. Indeed, so far as libelant's counsel are concerned, there seems to be no doubt that they have heretofore shared the established view that workaways are seamen employed by the ship operator and entitled to the superior status of that privileged rating. It is plain that in drawing the libel decedent was regarded by counsel as entitled to be classed as a seaman employed by the United States. Not only did Article IV of the libel so allege (R. 4), but Article II (R. 3) claimed the seaman's right to proceed without prepayment of costs—a right not avail-

able to a mere passenger utilizing the vessel as a means of transportation. We therefore submit that there is no foundation for the contrary holding of the court below and it should be reversed.

II.

Libelant's Decedent Was a Civilian Employee of the United States, the Exclusive Right for Whose Death in the Service of His Ship Was Under the Federal Employees' Compensation Act.

The court below clearly was in error if it meant to hold that libelant's decedent, because he was a workaway employed by the United States on a military transport, was not within the coverage of the Federal Employees' Compensation Act and the rule of *Johansen* v. *United States,* 343 U.S. 427, rehearing denied 344 U.S. 848. Unless excluded by special statute, every employee on a vessel publicly operated by the United States comes within the coverage of the Compensation Act. Even merchant marine cadets on school ships come within the coverage of the Act and their compensation rights are exclusive of any cause of action against the United States under martime law. *Sbarbaro* v. *United States,* (E.D. Pa.) 1952 A.M.C. , F. Supp. . Workaways employed by the United States as members of the crew of a publicly operated vessel are an *a fortiori* case.[3]

---

[3] The court below appears to have been confused, as it was in *Gibbs* v. *United States,* 94 F. Supp. 586, concerning the status of seamen on public vessels *operated by* the United States as opposed to those on merchant vessels *operated for* the United States. All public vessel seamen employed by the United States are entitled to compensation as their exclusive right even when the public vessel involved is "employed as merchant vessel" *by* the United

The Federal Employees' Compensation Act applies to every employee of the United States who is in the civilian or so-called "civil service", as distinct from the "military service," unless he is expressly excluded therefrom. The Compensation Act provides (Sec. 1, 5 U.S.C. 751) "That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty." There is no possible exception which could apply to exclude a workaway on an Army Transport such as decedent here. The Civil Service Rules, which were in effect in 1947, expressly provided, with respect to the Army Transport Service, that "all employees on transport ships, with the exception of the officers and

---

States, so as to bring it not only within the Public Vessels Act but within the Suits in Admiralty Act (Sec. 2; 46 U.S.C. 742; see H. Rep. No. 669, 66th Cong. 2d Sess., p. 5; reprinted 59 Cong. Rec. 3631). Merchant vessel seamen employed by private operators are not entitled to compensation and have their exclusive right by suit for injury even when the merchant vessel involved is privately operated *for* the United States so as to permit them to bring such suit not only against their private employers but also against the United States under the Suits in Admiralty Act (Sec. 2; 46 U.S.C. 742). Thus, in none of the cases cited in *Gibbs* (94 F. Supp. at 589, fn. 9) as having been allowed to proceed against the United States "without any discussion of the FECA" were the seamen covered by the FECA (See 34 Op. A.G. 120 and Comp. Gen. deision A-31684, refusing to accept 34 Op. A.G. 363), although the underwriters for the private operators might have voluntarily offered settlement by payment of "compensation." Compare *In re Panama Transport Co.* (S.D. N.Y., 1951) 98 F. Supp. 114, 117 and *Bay State Dredging Co.* v. *Porter* (1st Cir., 1946) 153 F. 2d 827, with *Stewart* v. *United States,* (E.D. La., 1928) 25 F. 2d 869. The court below seems to have thought that consistency required the Government to deny such seamen a right to sue as well as any right to compensation.

certain others, are employees in the unclassified civil service exempt from examination."[4]

Nowhere is there any indication that a distinction could be drawn amongst various types of civilian crew members on military transport vessels nor that civilian seamen employed by the Army as workaways could be differently treated from those employed at the full wages of the position to which they were assigned. This is illustrated by the fact that in the present case the compensation payable on account of the death of decedent as a workaway depends upon the full pay of his position of ordinary seaman in which he was serving at the time of his death and not upon the nominal wages paid him because he was employed as a workaway on the particular voyage.

Certainly nothing in the *Johansen* case indicates an intention on the part of the Supreme Court that dependants of employees on military transports were to enjoy an election either to accept compensation or to bring suit for damages merely because as workaways their wages for the particular voyage were at the rate of $30 instead of $150 per month. The Supreme Court specifically rejected the contention that Congress intended that there should be any right of election in any case. It held that compensation when available is exclusive and declared "There is no reason to have two systems of redress" (343 U.S. at 439), "Had Congress intended to give a crew member on a public vessel a right of recovery for damages, * * * we think that

---

[4] Civil Service Rules, Schedule A, 5 Code of Fed. Regs. Secs. 2.1, 2.3, 50.0, 50.4 (b) pp. 9, 48, 51. Officers were in the classified civil service.

this advantage would have been specifically provided'' (*ib.* at 440).

The Supreme Court has thus held that specific legislation is necessary to take any particular case out of the normal rule that compensation of every type is exclusive wherever it is available. The Court emphatically rejected the argument that an express declaration of exclusiveness, such as was added for the first time in 1949, is necessary. It said (343 U.S. at 433, 439-440, 441):

> It is quite understandable that Congress did not specifically declare that the Compensation Act was exclusive of all other remedies. At the time of its enactment, it was the sole statutory avenue to recover from the Government for tortious injuries received in Government employment. Actually it was the only, and therefore the exclusive remedy. See *Johnson* v. *United States,* 186 F. 2d 120, 123.[5]
>
> * * * * *
>
> The Federal Employees Compensation Act, 5 U.S.C. §§ 751 *et seq.,* was enacted to provide for injuries to Government employees in the per-

[5] Accord, *Posey* v. *Tennessee Valley Authority,* (5th Cir., 1937) 93 F. 2d 726, 728: ''This compensation is the sole remedy ordinarily available to an injured employee of the United States because of the general refusal to permit suits for torts. It is not a gratuity or grace, but a measured justice operating on the same general basis as state compensation laws. We entertain no doubt that Congress can limit the remedy of injured employees of its instrumentality to this compensation. We have but little doubt that it is so intended.'' Thus, despite the fact that the same court

formance of their duties. It covers all employees. Enacted in 1916, it gave the first and exclusive right to Government Employees for compensation, in any form, from the United States. It was a legislative breach in the wall of sovereign immunity to damage claims and it brought to Government employees the benefits of the socially desirable rule that society should share with the injured employee the costs of accidents incurred in the course of employment. Its benefits have been expanded over the years. See 5 U.S.C. (Supp. III) §§ 751 *et seq.* Such a comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive. See *United States* v. *Shaw,* 309 U.S. 495.[6]

* * * * *

This Court accepted the principle of the exclusive character of federal plans for compensation in Feres v. *United States, 340 U.S. 135. Seeking*

---

in *Sevin* v. *Inland Waterways Corp.,* (5th Cir., 1937) 88 F. 2d 988, had held, like this court in *United States* v. *Loyola,* (9th Cir., 1947) 161 F. 2d 126, that there was *jurisdiction* for government seamen's suits against the United States, Sevin's libel (E.D. La. Adm. No. 237) was dismissed. Accord, *United States* v. *Meyer,* (5th Cir.) 1952 A.M.C. 2053, 200 F. 2d 110, dismissing the libel "for failure to state a cause of action."

[6] *Feres* v. *United States,* (2d Cir., 1949) 177 F. 2d 535, 537-538, aff'd. 340 U.S. 135, similarly explains the omission of the original thirteenth exception covering compensation claims, by observing that sec. 7 of the F.E.C.A. "provided that as long as an employee is in receipt of compensation under the act 'he shall not receive from the United States any salary, pay, or remuneration whatsoever except for services actually performed, and except pen-

so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." p. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.

* * * * *

All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. *As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.*[7]

---

sions for service in the Army or Navy of the United States' * * *. Consequently, it would seem that the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary." And in *Dahn* v. *Davis,* (1922) 258 U.S. 421, 429-430, the Supreme Court said of sec. 7, "It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the act."

[7] As was said in *Lewis* v. *United States,* (D.C. Cir., 1951) 190 F. 2d 122, 124, 342 U.S. 869, "Congress is the body which must ultimately pass on the question of the amount and sufficiency of the benefits to be received by the Park Police, or by any other group of Federal employees. Congress annually appropriates for their salaries and for the amounts to be contributed by the Federal Government under legislation providing for retirement pay and compensation for injuries. Congress can increase or reduce these amounts. It can grant new gratuities through private bill or general legislation. And 'if we misinterpret the Act, at least Congress possesses a ready remedy.' *Feres* v. *United States, supra,* at p. 138."

It is, therefore, our view that once it is established that workaways are seamen and not passengers, the *Johansen* case is fully dispositive of the case now at bar. It decides that civilian employees of the United States, including those workaways serving as members of the civil service crews on military transports, are covered exclusively by the Federal Employees' Compensation Act. Libelant's rights under the Compensation Act therefore preclude the existence of any cause of action for damages in the libelant and required the dismissal of her libel by the court below.

We do not understand the court below to have disagreed that compensation of any type is exclusive if available, so that if a workaway is in fact—as the court below found libelant's decedent to be in this case (R. 17-18)—an employee of the United States, the libelant's compensation rights would be exclusive. On the contrary, the same district judge who decided the present case has held, applying the rule of the *Feres,* and *Johansen* cases, that the system of veterans' compensation, like any other compensation system, precludes recovery by suit for injuries sustained in the course of medical treatment under the veterans' benefit statutes. *Pettis* v. *United States,* (N.D. Calif., 1952) 108 F. Supp. 500. And the same rationale would seem applicable here for, as the Supreme Court said in *McMahon* v. *United States,* 343 U.S. 25, 27, while seamen enjoy a superior status as wards of the admiralty judges and "legislation for the benefit of seamen is to be construed liberally in their favor, it is equally true that statutes which waive immunity of

the United States from suit are to be construed strictly in favor of the sovereign."

We believe that the court below would have dismissed libelant's suit were it not for its belief that workaways should be held to be passengers and not seamen. We therefore submit that, since they plainly are seamen, this Court should direct the dismissal of the libel.

III.

Dismissal of the Libel on the Ground That Compensation Is Exclusive Was Expressly Contemplated by Congress and Will Give Libelant a Larger Recovery Than the Judgment Below.

For the reasons set forth above, we submit that libelant's claim for the loss of her husband in the service of his ship is not actionable. That does not mean that the United States will not compensate her for the loss of her husband. Her compensation claim will be reopened as provided in section 303(g) of the 1949 Compensation Act amendments (5 U.S.C. (Supp. V) 757 note) and her benefits thereunder will be worth $37,283.17, or over twice as much as her $15,000 judgment below.

A detailed statement of the amounts due the libelant at the time of the $15,000 award below is contained in a letter from the Chief Claim Examiner, Bureau of Employees Compensation (Appendix E, *infra,* pp. 36). It shows that as of November 1, 1951, just before the court below filed its opinion of November 14, 1951, fixing libelant's recovery at $15,000, libelant could immediately have collected accrued compensation of $4,042.44, consisting of $1,012.32 for her minor daughter and $3,030.12 for herself. Thereafter, until

the minor daughter became eighteen on November 18, 1964, libelant would receive a further $14,671.80, consisting of 156 monthly installments of $25.65 for the daughter and $68.40 for herself.[8]

These amounts, which added to the $4,042.44 already accrued total $18,714.24, would of themselves substantially exceed the $15,000 judgment. But after the minor daughter's arriving at age 18, libelant's compensation benefits will increase and will continue thereafter at the higher rate of $76.95 per month. The commuted value of those higher installments for libelant's life expectancy at that time is $18,568.93.[9] This amount, added to the previous total of $18,714.24, shows that

---

[8] If libelant elected immediate payment for herself of the $5,000 war risk benefit, her own installments would not, of course, accrue until about April 1, 1954, but the $1,012.32, for account of the minor daughter, would still be payable immediately. See Compensation Bureau's letter, Appendix E, *infra,* p. .

[9] When the minor daughter, born November 18, 1946, becomes age 18 in 1964, the widow, born December 24, 1925, will be age 39. The value of her annuity of $923.40 (or $76.95 a month), multiplied by the value of an annuity of $1.00 at three percent for a white female age 39, or $20.1093, is $18,568.93. U. S. Bureau of the Census, *U. S. life tables and actuarial tables, 1939-1941* (G.P.O., 1946) p. 77. These actuarial functions tabulated by the Census are slightly higher than those of the Commissioner's 1941 Standard Ordinary Mortality Table, recognized by law in California, Oregon and many other states; the Commissioner's tables in turn are much more favorable than are commercial rates because they also are based on interest and mortality only and do not include any allowance for factors, such as operating expenses, which go to determine the rates actually charged by insurance companies (*ibid.,* p. 55-57). If libelant sought to invest the $12,000 net proceeds of her judgment, these factors would materially reduce the annuity she could purchase and further increase the desirability of compensation.

the full value of libelant's compensation claim is $37,283.17, or over twice the amount of her $15,000 judgment. Indeed, libelant's compensation benefits are actually over three times the *net amount* she would obtain from the $15,000 judgment below, because we must presume that the $15,000 would be subject to deduction of the standard attorneys' fee of twenty percent (cf. 28 U.S.C. 2678), thus giving libelant's attorneys a $3,000 fee and herself a net realization of $12,000.

There is no doubt that libelant can receive compensation if this Court orders her libel dismissed. In enacting the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, Congress expressly contemplated the existence of lawsuits brought by compensation beneficiaries such as libelant. On the one hand, it provided that where such suits are compromised or judgments satisfied no compensation may be paid (Sec. 302; 5 U.S.C. (Supp. V) 791-3). On the other, Congress provided that where such litigation is proceeded with and dismissed because compensation is exclusive, the claimants shall have one year from the dismissal within which to claim their compensation rights (Sec. 303(g); 5 U.S.C. (Supp. V) 757 note).

Congress contemplated that when the Supreme Court finally resolved the conflicting lower court decisions regarding exclusiveness, it was highly probable that it would hold that the original Compensation Act of 1916 had always been exclusive as regards government civil service seamen. Congress therefore,

expressly provided in section 303(g) of the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, 5 U.S.C. (Supp. V) 757 note, that, if the 1916 Compensation Act should be held to be exclusive, "any person who has commenced a civil action or an action in admiralty with respect to such injury or death" may—

> * * * If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.

This provision was one of the amendments proposed by Senator Morse with a view to protecting the interest of civil service seamen and their beneficiaries, since the eventuality that the 1916 Act would be held by the Supreme Court to be exclusive in the case of seamen was not unexpected. Thus, speaking of the above-quoted provision of Section 303(g), designed, as Senator Morse put it, "to permit seamen to pursue

their remedies (if they have any) sought in pending cases or to come under the terms of the Compensation Act," he said (95 Cong. Rec. 13609)—

> * * * Moreover, in recognition of the fact that some legal actions might be decided adversely to the claimant on grounds other than the merits of the claim, *it is provided that persons whose pending claims are dismissed* on jurisdictional grounds, insufficiency of the pleadings, or *because the remedy under the Compensation Act is exclusive,* may file claim under the Compensation Act within similar time limitations. [Emphasis supplied].

And in the same way, in accepting the seamen's amendments of Senator Morse, Senator Douglas, who had charge of the bill on the floor, declared "we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies which claims and denials have not yet been adjudicated" (95 Cong. Rec. 13609).

The Congressional purpose was to preserve the status quo pending decision of the Supreme Court, while at the same time protecting claimants against any loss of rights by continuing their litigation until the Supreme Court should speak. The seamen's protective amendments of Senator Morse therefore fully

protect libelant in this case against the consequences of the dismissal of her action, as required by the Supreme Court's final decision of the question in the *Johansen* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the district court should be reversed and the case remanded with instructions to dismiss the libel for failure to state a cause of action but without prejudice to libelant's right to renew her claim for compensation in accordance with the proviso of section 303(g) of the Act of October 14, 1949, c. 691, 63 Stat. 866, 5 U.S.C. (Supp. IV) 757 note.

WARREN E. BURGER,
Assistant Attorney General,

CHAUNCEY F. TRAMUTOLO,
United States Attorney,

LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,
Attorneys for the United States.

February 1953.

APPENDIX A

1. The Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (5 U.S.C. 751 *et seq.*), provides in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.
>
> * * * * *
>
> Sec. 32. That the commission is authorized to make necessary rules and regulations for the enforcement of this Act, and shall decide all questions arising under this Act.
>
> * * * * *
>
> Sec. 36. The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided

for in this Act. Compensation when awarded shall be paid from the employees' compensation fund.

2. The pertinent provisions of the Federal Employees Compensation Amendments of October 14, 1949, c. 691, 63 Stat. 854, are as follows:

Sec. 302. The provisions of this Act shall not be construed to authorize the payment of any compensation under the Federal Employees' Compensation Act in any case where, pursuant to private relief legislation, a beneficiary of such legislation has accepted payment of a grant in satisfaction of the liability of the United States (or its corporation, agency, or other instrumentality) in such case, or where such liability has been compromised and settled, or other satisfaction received, as the result of any action sounding in tort or under maritime law, or where a lump sum has been received under section 14 of the Federal Employees' Compensation Act and the lump-sum award is not modified or set aside for other reasons.

Sec. 303 * * *

(g) The amendment made by section 201 of this Act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such Act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this Act:

Provided, however, That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this Act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after enactment of this Act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.

APPENDIX B

106725

ADVICE OF PAYMENT TO ACCOMPANY CHECK

General Accounting Office

Claim No.: *2985247* WASHINGTON, *January 3, 1949*
Muriel Firth, as widow of CERTIFICATE NO.
Martin W. Firth, deceased, *1714337*
81 Prosser Street,
Salishan,
Tacoma, Washington.

I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of—

SEVEN AND NO/100 Dollars (*$7.00*)

on account of

amount due Martin W. Firth, as an employee of the War Department (now Department of the Army), Transportation Corps, USAT "Clarksdale Victory" under the Missing Persons Act of 1942, as amended, 56 Stat. 143. (Army FINKE-(2) 154)

2180425 Finance Service, Army, 1948

(801-970 P 970-13 S99-999)

[Endorsed]
C. B. LENOW COL. FD
WASHINGTON, D. C.
950
SYM. 210-186

The enclosed Treasury check is in settlement of said claim(s).

The Comptroller General of the United States
By B. S. LAWRENCE 470792
26 Jan 1949

CLAIMANT'S NOTICE

APPENDIX C

Samuel L. Crippen
Res. Proctor 8706

Creighton C. Flynn
Res. Garland 7661

Crippen and Flynn
Lawyers

Suite 710 Rust Building
Broadway 6714
Tacoma 2, Wash.

October 22nd, 1948.

Bureau of Employees' Compensation
Federal Security Agency
Federal Security Building
4th Street and Independence Ave., S.W.
Washington 24, D. C.

Reference: X-346150

Gentlemen:

We enclose herewith the following documents: forms CA-5, CA-42; certified photostatic copy of Marriage Certificate, and certified copy of Birth Record. We wish to advise that we represent Muriel Firth, widow of the decedent and are filing an action against the United States for wrongful death under the Jones Act.

Until that action has been determined, we do not wish to accept any benefits under the United States Employees' Compensation Act, and we are filing these documents with you merely to preserve Mrs. Firth's rights in the event that she should later desire to receive benefits.

We wish to advise that waivers have been submitted to Mrs. Firth by the Acting Assistant Adjutant General of the San Francisco Port of Embarkation for her signature in order to qualify for benefits under the Seaman's War Risk Policy, these waivers stating that if an application had been made for United States Employees' Compensation Act benefits, and she desired to receive War Risk benefits in lieu of compensation, that said compensation should be deducted from the insurance and that should constitute a release as to the United States Government and a satisfaction of any claim for United States Employees' Compensation Act benefits. As we pointed out in our letter to the Acting Assistant Adjutant General, we are not aware of the law under which Mrs. Firth is required to waive her rights before qualifying for benefits under the Seaman's War Risk insurance.

The claim for burial expenses will be preferred by Theo. B. Gaffney, mortician, who handled the case.

We would appreciate hearing from you as to whether these documents comply with your requirements.

Sincerely yours,

CRIPPEN & FLYNN and HAROLD A. SEERING

By: Creighton C. Flynn

CCF:DT

cc: Hdq., San Francisco
Port of Embarkation
Fort Mason, Calif.

APPENDIX D

July 13, 1949 X-346150

Mrs. Muriel Firth
81 Prosser Street
Salishan
Tacoma, Washington
Dear Mrs. Firth:

The Bureau has reference to the claim for compensation which you filed on account of the death of Martin W. Firth, a former employee of the Army Transport Service, who died on November 24, 1947.

The claim on behalf of Barbara Louise Firth, minor daughter of the decedent, has been approved for compensation equal to $17.10 per month beginning on November 25, 1947 and continuing until she dies, marries, or reaches the age of eighteen years, or, if over eighteen years and incapable of self-support, becomes capable of self-support.

On July 5, 1949 a check in the amount of $311.22 went forward to you representing compensation for the period from November 25, 1947 to May 31, 1949. Beginning on July 1, 1949 monthly checks for $17.10 each will go forward on the first of each month.

There is enclosed a supply of claim forms CA-13 to be used in claiming further compensation. One of these forms should be completed on or soon after the first of each JANUARY and JULY in accordance with the instructions on the back of the form, and forwarded to this office. If claims are not forwarded on the above dates compensation will be suspended until the Bureau

has ascertained whether you are still entitled to receive the compensation.

If Barbara's status should change and a check reaches you in payment of compensation you should return the check to this office at once, with an explanation.

This letter should be retained by you as evidence of the award and the instructions carefully complied with to insure prompt payments.

Very truly yours,

R. W. GREENE
Chief of Section

WJH:cke

CC-1-The Chief of Transportation, War Department, Washington 25, D. C.
Att: Col. Wilbur S. Elliott, Water Transport Service

2-The Commanding General, San Francisco Port of Embarkation, Building 213, Fort Mason, California

APPENDIX E

U.S. Department of Labor
Bureau of Employees' Compensation
Washington, 25, D. C.

Address only:
Bureau of Employees' Compensation
Washington 25, D. C.

In Reply refer to File No. X-346150

October 24, 1952

Leavenworth Colby, Esq.
Special Assistant to the Attorney General
Admiralty and Shipping Section
Department of Justice
Washington 25, D. C.

Re: USAT Clarksdale Victory — Government Vessel Employee's Death, November 24, 1947
Muriel Firth, Admx. of the Estate of Martin W. Firth, deceased v. United States.
ND California, Adm. No. 25428-E

Dear Mr. Colby:

This will reply to your letter of October 17, 1952, requesting information as to the amount of compensation under the Federal Employees' Compensation Act which had accrued as of November 1, 1951, and the amount thereafter payable, in the case of Mrs. Muriel Firth, widow of Martin W. Firth, on account of the death of her husband, a former employee of the

Army Transportation Corps, Water Division, who died on November 24, 1947, when the USAT CLARKSDALE VICTORY was lost.

For the widow herself, the amount of compensation accrued as of November 1, 1951, totals $3030.12. During the same period the amount accrued to her for Barbara Louise Firth, daughter of the deceased, totals an additional $1012.32.

Compensation for the widow herself will continue payable after November 1, 1951, until her death or remarriage, at the monthly rate of $68.40. Compensation of Barbara will continue payable at the monthly rate of $25.65, until the child dies, marries, or reaches the age of eighteen, or if over eighteen years and incapable of self-support, becomes capable of self-support.

From the date that compensation ceases to be payable for the child, the compensation payable for the widow herself until her death or remarriage will be increased to the monthly rate of $76.95.

The foregoing payments are subject, however, to the provisions of the war risk insurance policy, which state that the benefits paid thereunder must be deducted from any compensation benefits otherwise payable to the beneficiary of the policy. If Mrs. Firth should elect to accept payment of the $5,000 war risk benefit, no compensation benefits can be paid to her for her own account until such time as the total amount payable provided under the Federal Employees' Com-

pensation Act shall total the $5,000 paid under the insurance policy. In the case of Mrs. Firth this would appear to be about April 1, 1954.

Very truly yours,

DANIEL M. GOODACRE
Chief Claim Examiner

DMG:djv:fgl

☆U.S. GOVERNMENT PRINTING OFFICE 1953—239313/P.O.1041

No. 13525

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SAN DIEGO GAS AND ELECTRIC COMPANY,
Respondent.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13525

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SAN DIEGO GAS AND ELECTRIC COMPANY,
Respondent.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-1029

In the Matter of
SAN DIEGO GAS AND ELECTRIC COMPANY
Employer,
and
COSBY M. NEWSOM, An Individual.

COMPLAINT

It having been charged by Cosby M. Newsom, an individual, that San Diego Gas and Electric Company, hereinafter called the Respondent, has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101-80th Congress, First Session, hereinafter called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Respondent is a California public utility corporation engaged in supplying gas and electricity for industrial, commercial and domestic use in San Diego County, California. Its annual revenue is in excess of $1,000,000. Respondent purchases annually

electricity, equipment and supplies originating outside the State of California valued at more than $1,000,000.

II.

Respondent is and at all times material herein, has been engaged in commerce within the meaning of the Act.

III.

International Brotherhood of Electrical Workers, A. F. of L., Local Union 465, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

IV.

Respondent, by its officers, agents and employees, including without limitation, Warden, instrument engineer, Kalins, efficiency engineer, and Hathaway, superintendent, on and about January 15, January 16 and January 31, 1951, and thereafter to and including the date of the issuance of this Complaint, has interfered with, restrained and coerced its employees and is interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act by various acts and statements including but not limited to the following:

(a) Advising its employees that their union and concerted activity placed their jobs in jeopardy;

(b) Advising its employees that they could receive no benefits through the Union:

(c) Threatening employees with loss of privil-

eges should they persist in union and concerted activities;

(d) Promising greater benefits to employees and continued privileges as inducements to employees to cease their union and concerted activities.

V.

Respondent, while engaged in business as described above on or about January 31, 1951, did discharge and at all times since that date has failed and refused to reinstate Cosby M. Newsom for the reason that said Cosby M. Newsom had designated the union as his collective bargaining representative and had engaged in concerted activities with other employees for their mutual aid and protection.

VI.

Respondent, by the acts set forth in paragraph V above did discriminate in regard to hire and tenure of employment of its employees and has thereby engaged in, and is thereby engaging in unfair labor practices within the meaning of Section 8(a), subsection (3) of the Act.

VII.

Respondent by its acts and each of them as set forth in paragraphs IV, V and VI above, did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act and did thereby engage in and is thereby

engaging in unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

VIII.

The acts and conduct of Respondent as set forth in paragraphs IV, V, VI, and VII above, occurring in connection with Respondent's operations described in paragraphs I and II above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IX.

The aforesaid acts of Respondent, and each of them, as set forth in paragraphs IV, V, VI and VII above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 12th day of June, 1951, issues this Complaint against San Diego Gas and Electric Company, Respondent herein.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director, National Labor Relations Board,
Twenty-first Region.

General Counsel's Exhibit No. 1-E.

[Title of Board and Cause.]

ANSWER OF EMPLOYER

Now comes the above-named employer, San Diego Gas & Electric Company, hereinafter called the Respondent, and answers the complaint of Cosby M. Newsom, as follows, to wit:

I.

Respondent admits the allegations contained in Paragraphs I, II and III of said complaint.

II.

Respondent denies that through its officers, or agents, or employees, or through anyone named in said complaint, or at all, on January 15 or January 16 or January 31, 1951, or on any date whatsoever, it has either interfered with, or restrained, or coerced its employees, or any of them, or is interfering with, or restraining, or coercing its employees, or any of them, in the exercise of any rights guaranteed in Section 7 of the National Labor Relations Act, by any acts or statements whatsoever. Said Respondent further denies as follows:

(a) That it is advising, or has advised, its employees that their union or concerted activity placed their job, or any of their jobs, in jeopardy;

(b) That it advised, or is advising, its employees, or any of them, that they could receive no benefits through the union;

(c) That it is threatening, or has threatened its

employees, or any of them, with loss of privileges should said employees, or any of them, persist in union or concerted activity, and

(d) That it has promised, or is promising, greater benefits to employees, or any of them, or continued privileges, as inducements to employees, or any of them, to cease their union or concerted activity.

III.

Said Respondent further denies that on or about January 31, 1951, or at any other time, it discharged or has failed or refused to reinstate Cosby M. Newsom for the reason that Cosby M. Newsom has designated the union as his collective bargaining representative, or had engaged in concerted activities with other employees for their mutual aid and protection. Said Respondent further denies that it discharged or failed or refused to reinstate said Cosby M. Newsom for any of the reasons set out in Paragraph V of said complaint.

IV.

Said Respondent alleges that it discharged the said Cosby M. Newsom from its employment, and refused to reinstate him because of the unsatisfactory character of his work, and for good cause, and because the services of the said Cosby M. Newsom were unsatisfactory.

V.

Said Respondent further denies that it has at any

time interfered with, or restrained, or coerced, any of its employees in respect to their rights guaranteed under Section 7 of the National Labor Relations Act, or at all.

VI.

Said Respondent further denies that it has by any acts discriminated in regard to hire or tenure of employment of its employees, or has engaged in, or is engaging in, any unfair labor practices within the meaning of Section 8 (a), subsection (3) of the National Labor Relations Act; and said Respondent further denies that it has by any act interfered with, restrained, or coerced, or is interfering with, or restraining, or coercing its employees, or any of them, in the exercise of their rights guaranteed in Section 7 of the Act or did thereby engage in any unfair labor practices within the meaning of Section 8(a), subsection (1) of the National Labor Relations Act.

VII.

Said Respondent further denies that it has committed any acts whatsoever that constitute any unfair labor practices affecting commerce, within the meaning of any provisions of the National Labor Relations Act.

Wherefore, said Respondent prays that the said complaint be dismissed, and that an order be entered in favor of the Respondent and against the

said individual above-named, and finding that the allegations of the said complaint are not true.

SAN DIEGO GAS & ELECTRIC COMPANY,
Respondent
/s/ By A. E. HOLLOWAY,
President

LUCE, FORWARD, KUNZEL & SCRIPPS
/s/ By EDGAR A. LUCE,
Its Attorney

Duly Verified.

General Counsel's Exhibit No. 1-H.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

George H. O'Brien, Esq., for the General Counsel. Luce, Forward, Kunzel & Scripps, by Edgar A. Luce, Esq., for the Respondent.

Before: Howard Myers, Trial Examiner.

Statement of the Case

Upon a charge and an amended charge duly filed by Cosby M. Newsom, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel and the Board, by the Regional Director for the Twenty-first Region (Los

Angeles, California), issued his complaint on June 12, 1951, alleging that San Diego Gas and Electric Company, San Diego, California, herein called the Respondent, had engaged in, and was engaging in, unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

Copies of the complaint and the charges, together with notice of hearing thereon, were duly served upon the Respondent and Newsom.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondent (1) since January 15, 1951, by means of certain stated acts and conduct, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act; and (2) on or about January 31, 1951, discharged Newsom, and thereafter refused to reinstate him, because he had designated International Brotherhood of Electrical Workers, Local Union 465, affiliated with American Federation of Labor, herein called the Union, as his collective bargaining representative and had engaged in concerted activities with his coworkers for their mutual aid and protection.

The Respondent duly filed an answer denying the commission of the alleged unfair labor practices. The answer affirmatively averred that Newsom was discharged for good and sufficient reasons.

Pursuant to notice, a hearing was held at San Diego, California, from August 1 through August 3, 1951, before the undersigned, the duly designated

Trial Examiner. The General Counsel and the Respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues was afforded all parties. At the conclusion of the taking of the evidence, the General Counsel moved to conform the pleadings to the proof. The motion was granted without objection. The parties were then advised that they might file briefs with the undersigned on or before August 20, 1951. A brief has been submitted by counsel for the Respondent which has been carefully considered.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is a California public utility corporation, with its principal offices and plants located at San Diego, California, where it is engaged in supplying illuminating gas and electricity for industrial, commercial, and domestic use to the residents of the City and County of San Diego, California. The Respondent purchases annually electricity, equipment, and supplies originating from outside the State of California valued in excess of $1,000,000.

The Respondent admits, and the undersigned finds, that it is, and during all times material herein was, engaged in commerce within the meaning of the Act.

II. The Organization Involved

International Brotherhood of Electrical Workers, Local Union 465, affiliated with American Federation of Labor, is a labor organization admitting to membership employees of the Respondent.

III. The Unfair Labor Practices

Interference, restraint, and coercion; the discharge of Cosby M. Newsom.

A. Sequence of the pertinent facts.

For the past several years the Respondent and the Union have had collective bargaining contracts covering certain groups of the Respondent's employees; however, the instrument technicians, of which during all times material herein there were about five, were not covered by the said contracts.

In August or September 1950, Newsom[1] returned from Los Angeles, where he had spent a portion of his annual vacation, and told a group of his fellow instrument technicians that whereas the Respondent's top instrument technician, after three years of service, was receiving only $1.60 per hour, the starting wage of the instrument technicians employed in the same industry in the Los Angeles area was $1.90 or $2.00 per hour. During the course of the discussion which then ensued, it was pointed

---

[1] Newsom entered the Respondent's employ in February 1948, as a helper in the maintenance department. In the fall of that year, he was promoted to instrument technician Grade B and transferred to the electrical production department.

out by one of the group that the differential existing between what the Respondent paid its instrument technicians and that received by the Los Angeles area men was due primarily to the fact that the latter group was unionized. The men then discussed the plausibility of having the Union represent them as their collective bargaining representative.

For reasons not here material, the question of the Respondent's instrument technicians joining the Union lay dormant until a few days prior to January 15, 1951. Upon reporting for work that day, Newsom and two other instrument technicians (Thomas Fowler and Roy Shroble) told Harold L. Warden, instrument engineer and their immediate superior, that the instrument technicians felt aggrieved because of the low wages they were receiving in comparison to the wages paid the Los Angeles area instrument technicians employed in the same industry and therefore they were considering asking the Union to represent them for they felt that their only chance of receiving higher wages was through union representation. Warden sympathized with their plight, told them of his unsuccessful efforts to obtain wage increases for the instrument technicians, and then said that he would aid them in every way possible to further their unionization program.

Immediately after Newsom, Fowler, and Shroble had left, Warden went to the place where Ollie Webb and Tony Botwinis, the other two instrument technicians, were working and, after ascertaining

that they also were of the opinion that their only chance of securing wage increases lay in unionization, he told Webb and Botwinis that he would help them in their endeavors.

Warden then went to the office of Joseph L. Kalins, efficiency engineer and Warden's immediate superior, and apprised Kalins of the instrument technicians' plans to join the Union. Warden and Kalins then proceeded to the office of Charles R. Hathaway, superintendent of the electrical department and their immediate superior, and informed him of the instrument technicians' intentions. Hathaway requested that the instrument technicians be brought to his office later in the day. Pursuant to Hathaway's request[2] Warden, Kalins, and the five instrument technicians met with Hathaway toward the close of the day shift.

Hathaway, the managerial spokesman, opened the meeting by inquiring who was the employees' spokesman. He was informed that none had been selected because the employees were attending the conference solely "to listen and not to talk."[3] Hathaway then asked if the men's contemplated action was prompted by any grievance other than the wage question and was informed that there was none

---

[2] Warden testified that he was instructed by Hathaway to make it clear to the men that the meeting was being called at Hathaway's "suggestion" and not at his "request". Hathaway, on the other hand, testified that he requested the meeting.

[3] Newsom, although not the official spokesman for the employees, "carried the ball" and did most of the talking for them.

other. Hathaway then stated that the men should have sought an increase through normal company channels instead of attempting to enlist the aid of the Union. Newsom responded by saying that he had been informed that such a course would avail the men nothing. Hathaway replied that had the men applied to him, through Warden and Kalins, for wage increases, he would have given the matter speedy consideration, whereas, because the Union's contract with the Respondent had about a year more to run, he did not believe the Union would be able to get the men any action for a long period of time. During the course of the discussion that then ensued, Hathaway pointed out to the men that, although he personally did not care whether the instrument technicians joined the Union or not, he thought the Respondent's top management might object to the instrument technicians being represented by the same union which was the representative of the other employees because of the nature of the instrument technicians' jobs, coupled with the fact that the instrument technicians had access to certain confidential papers and records. Hathaway also stated that the men should not join the Union before giving considerable thought to the possibility that by joining they might forfeit certain privileges and advantages which they were presently enjoying as non-union employees. The meeting concluded when the men stated that they would confer among themselves, discuss the matter thoroughly, and then inform Hathaway of their decision.

Immediately after the above related Hathaway

conference, the five instrument technicians met and decided to request the Union to represent them. In furtherance of this decision, Newsom composed the following petition:

> This is to certify that the undersigned, being a unanious (sic) majority of the instrument technicians of the Electrical Production Department of the San Diego Gas and Electric Company, do hereby assign Local 465, International Brotherhood of Electrical Workers, A. F. of L. as the Collective Bargaining Agent for the purposes of negotiating wage scale agreement with the San Diego Gas and Electric Company.

Three copies of the said petition were typed by a notary public and then each of the copies was signed and sworn to by the five instrument technicians before the said notary public. One copy of the petition was immediately forwarded to the Respondent's vice-president in charge of operations and another copy was sent to the Union.

Upon arriving at the plant the following morning (January 16) at the usual reporting time, Newsom, Fowler and Shroble were told by Warden, to quote Newsom's testimony,

> * * * our (instrument technicians) position didn't look too good, and that if he (Warden) were in our shoes he would get these affairs in order because there is a possibility we may all be looking for other jobs.

Newsom further testified that Warden also said

that the instrument technicians would find it difficult to obtain employment as instrument technicians elsewhere because Warden doubted whether they had the necessary qualifications to combat the competition they would encounter; that Warden also informed them that they would meet with strong opposition in their organizational move; and that, in response to Warden's remarks, he stated that he had no intentions of looking for other employment until the instrument technicians had completed their organizational drive.

Fowler testified that during the course of the aforesaid conversation, Warden expressed doubt as to the instrument technicians' chances of getting into the Union and then stated that he hoped their affairs were in order, whereupon the men "assured him we were prepared to look for other work, if necessary."

Shroble testified that during the aforesaid conversation, Warden remarked that he "hoped our family affairs were in order so we could look for another job."

Regarding the talk he had with the aforementioned instrument technicians on January 16, Warden testified that, after being advised that the five instrument technicians had requested the Union the previous evening to represent them,

> I suggested to the men that they have their facts, figures, or substantiating evidence, and so forth, in regard to their demands in very good conditions; that it would necessary for them to have a good clean case for their de-

> mands for more money. I advised the men to think this over very carefully and not go up to the union with a case of demands for more money without supporting facts; that they should have all of their affairs connected with the union activities in first-class condition before they presented it, because if they should present a demand for more money and not have it substantiated with facts and figures, undoubtedly their demands would be refused. In the event their demands would be refused, it would be doubly hard for them to again open demands for more money.

Warden, under questioning by Respondent's counsel, denied he said to Newsom, Fowler, and Shroble in substance or in effect, "Your position doesn't look so good. If I were in your shoes, I would get my affairs in order as you might be looking for another job" or stated to them, "if you fellows keep this up you will be looking for another job" or "you better have your family affairs in order so you can look for another job."

The undersigned was favorably impressed with the forthright and honest manner in which Newsom, Fowler, and Shroble testified. Neither on direct examination by the General Counsel nor under cross-examination by the Respondent's counsel did they give any indication that they were attempting to suppress the true facts. On the other hand, Warden did not so impress the undersigned. The undersigned, however, was impressed by Warden's repeated denials of that which was true and his con-

stant attempts to explain that which was not true. Upon the entire record in the case, the undersigned is convinced, and finds, that Warden advised Newsom, Fowler, and Shroble on January 16, that if they continued their union activities their employment by the Respondent might be short-lived. This conclusion is strengthened when consideration is given to (1) the following testimony of Shroble given under cross examination by Respondent's counsel:

> Q. And at time you didn't construe it (Warden's remarks) as being any threat that you would lose your jobs if you continued your union activity?
>
> A. I believe I did. I believe I did a lot of thinking as to what would happen if I did continue this.

and (2) Fowler's testimony that he construed Warden's remarks to mean but one thing; namely, that the instrument technicians would love their jobs if they continued their union activities.

On January 30, Hathaway held his usual weekly departmental meeting with his two station chiefs.[4] By special permission, Kalins and Warden were permitted to attend.

Hathaway testified, and his testimony with respect to this meeting is in substantial accord with the testimony of the others present, that after Kalins and Warden had concluded their presenta-

---

[4] Namely, Kenneth Campbell and Walter S. Zitlow.

tion of a proposed training program for the instrument technicians and the plan had been unanimously approved, he inquired of Kalins and Warden how the instrument technicians were performing their tasks; that Kalins and Warden replied that all were doing satisfactory work except Newsom; that he then asked each person present for his opinion of Newsom's work; that each replied it was not satisfactory and each added that in his opinion Newsom "would not become a satisfactory instrument man and should not be in the training course which was about to start"; that he then posed the question, "Should we terminate Newsom"; that each person replied in the affirmative; and that he thereupon instructed Kalins to discharge Newsom.[5]

On January 31, Newsom, accompanied by Warden, went to Kalins' office where Newsom was informed by Kalins, "you can apply for a transfer to another department through personnel, you can resign and probably get letters of recommendation, or we will terminate you within two weeks." When Newsom asked Kalins the reason for the aforesaid action, Kalins stated that Newsom's services were unsatisfactory and then proceeded to enumerate certain incidents which occurred during his tenure of employment. After a brief discussion regarding

---

[5] The instrument technicians, from time to time, work at the power station over which Zitlow and Campbell have supervision and hence Zitlow and Campbell are thus afforded an opportunity to appraise the work of the instrument technicians.

the said incidents, Newsom requested Kalins to call a meeting of all the instrument technicians and to inform them of the disciplinary action and the reasons therefor. When Kalins asked the purpose of such an unusual procedure, Newsom replied that the other men "were in the middle of a move to organize" and therefore the action taken against him had "a bearing on the rest of the members of the department." Thereupon, Kalins summoned the other four men to his office, informed them of the action taken against Newsom, and then stated the purported reasons therefor. Despite Newsom's detailed explanation that the incidents cited for his seeming neglect of duty took place over a three-year period, that none was of recent date, that he previously had satisfactorily explained to Warden's superiors, at the time Warden complained to them about the incidents, that the incidents were of little or no consequence. Kalins remarked that Newsom could no longer remain in the department. Kalins refused to recede from his adamant position to rid his department of Newsom even though, in response to his invitation to the instrument technicians to express their views with respect to the said disciplinary action, Fowler "said", to quote Kalins, "something to the effect that the men were all together in this thing and that he felt in his (Fowler's) own mind that the company possibly [was] trying to fire Newsom in order to break up their attempt at unionization; that they could, therefore, take it to the National Labor Relations Board."

Newsom refused to resign or to request a trans-

fer to another department. On February 15, the Respondent, because Newsom refused to take the aforesaid action, discharged him.

B. Respondent's Defenses

In support of its contention that Newsom's discharge was not violative of the Act, the Respondent called six witness,[6] each of whom was, at one time or another during Newsom's employment with the Respondent, either Newsom's immediate supervisor, or in charge of the instrument technicians' department, or a supervisor at the power station where Newsom was performing work and hence in a position to appraise his work. The testimony of the aforesaid six witnesses is summarized immediately below.

Warden testified that from the time he became Newsom's immediate supervisor in March 1949, Newsom's work was "spasmodic" and was so unsatisfactory that it did not create confidence on the part of the station chiefs or the other supervisors with whom Newsom came in contact; that in October 1949, he spoke to Newsom in private and told Newsom that complaints had been received from Zitlow about his work and then warned New-

[6] Namely, Hathaway, Kalins, Warden, Campbell, Zitlow, John T. Hardway, (efficiency engineer from November 1948, until the end of August 1950 when he re-entered the United States Navy at which time he was succeeded, as efficiency engineer, by Kalins), and B. L. Stovall (assistant station chief from November 1948, until his re-entrance into the United States Navy in August 1950).

som that his work would have to improve; that despite such warning, Newsom's work continued to be unsatisfactory, and because of it he discussed Newsom's poor work with Hardway; that in May 1950, he again spoke to Newsom and again warned Newsom that his work must improve; that in September 1950, Kalins, who had succeeded Hardway as head of the instrument technicians, warned Newsom that if Newsom's work did not improve, Newsom would be discharged; that in September 1950, because Newsom's work continued unsatisfactory, he recommended to Kalins that Newsom be discharged. Warden further testified that Newsom also engaged in "horseplay" with other instrument technicians to the detriment of the department; that on more than one occasion Newsom showed disrespect toward him; that in October 1949, Newsom remained away from the plant for three days without permission and without advising him of his intended absence. In support of his testimony that Newsom performed sloppy and careless work, Warden produced, and testified with respect to, certain work records of Newsom.[7]

Hardway testified that in June 1950, Warden complained to him about Newsom's work and he

---

[7] These records were discovered after Newsom had been discharged and admittedly played no part in the Respondent's determination to discharge Newsom. Therefore the undersigned finds that it would serve no useful purpose here to resolve the conflict in testimony as to whether the records disclose that Newsom's errors therein were or were not of a serious nature.

spoke to Newsom about the complaint; that he later received other complaints about Newsom's work, but took no action with respect thereto nor did he discuss them with Newsom; and that prior to August 1950, he established a system of rotation and noticed that when Newsom was paired with other technicians the work of both "fell down" and when the same technician was separted from Newsom the former's work improved. Hardway also testified that about six weeks after he had spoken to Newsom about the aforesaid June 1950 complaint of Warden, he inquired of Warden how Newsom was performing his duties and Warden replied, "All right but seemed to be slipping again."

Stovall's testimony with respect to Newsom's work consists mainly of conclusionary statements to the effect that from October or November 1948, until he re-entered the United States Navy in August 1950, he had heard of, and had made complaints relative to, Newsom's work; and that Newsom engaged in horseplay, conversed too often and too long with any person with whom Newsom came in contact.

Kalins testified that Newsom "was capable of a good deal of good natured mischief" adding, however, "it is very difficult to supply any specific instances"; that in September 1950, that because Warden had complained to him about certain unsatisfactory work performed by Newsom, he told Newsom, "there were certain things we would not tolerate; that we knew [he was] capable of better work than he was producing; that his work was sloppy

and that he could cure that by diligently applying himself''; that Newsom ''excused every action that Warden accused him of and became rather excited about some of the things''; that he informed Newsom that Newsom's work must improve—or otherwise Newsom would be discharged; that he concluded the conversation by informing Newsom that Newsom's work would ''be watched for a month''; that in October 1950, in his presence, he heard Warden tell Hathaway that Newsom was doing unsatisfactory work; that again in November or December 1950, he heard Warden complain to Hathaway about Newsom's poor work; and that Hathaway stated that he and Warden ''should be taking some action'', to which they replied, ''we were waiting until a more opportune time.''

Hathaway testified that the first complaint he received about Newsom was early in 1950, from Campbell; that the complaint was to the effect that the operating personnel were losing faith in Newsom's inspection work; that his investigation revealed that Newsom and Webb had been working on the complained of instruments and he instructed Hardway to put Newsom and Webb on separate jobs; that several times thereafter he inquired of Hardway regarding Newsom and each time Hardway reported Newsom ''would do all right after discussing the matter with him, but that his work would then become lax and he hoped eventually [Newsom] would realize the situation and make a good man''; that Zitlow complained several times about Newsom's

work;[8] that each time he asked Kalins to investigate the complaints; that Kalins' reports were unfavorable to Newsom; and that on two or three separate occasions prior to January 1950, he discussed Newsom's work with Kalins and Warden and each time Kalins and Warden reported that Newsom's work was unsatisfactory.

Campbell testified that just prior to May 1950, he received repeated complaints from the operating men under his supervision regarding the ineffective manner in which the control equipment was being maintained;[9] that he complained to Hardway about certain horseplay which he suspected Webb and Newsom had engaged in; that after he had investigated the matter he discovered that Newsom was not involved, but "apparently he was enjoying the effects of it at the expense of the storeroom men"; that from time to time he asked Hardway, Kalins, and Warden how Webb and Newsom were "getting along" because he had recommended each of them for the job of instrument technician; and that the answers to his inquiries were to the effect that Newsom's work was "spasmodic".

Zitlow testified that while Newsom was working at his power station in 1949, he noticed that Newsom's work was lax and subject to criticism; that

---

[8] Hathaway places these complaints as having been made several months after Newsom started working at the power station which was under Zitlow's supervision. Newsom started working there in 1949.

[9] This work was being performed by Newsom and Webb.

from time to time he had received complaints regarding the poor character of Newsom's work; and that he noticed Newsom spent entirely too much time in the office assigned to Newsom instead of being "at the scene of the work."

C. Concluding Findings

The foregoing recital compels several conclusions. For example, it seems incredible that if the Respondent regarded Newsom as guilty of all the shortcomings it now attributes to him, it would have retained Newsom in its employ as an instrument technician so long as to become the oldest instrument technician in point of service, or would have offered in January 1951, to allow him to transfer to another department. Secondly, it leaves unexplained why the discharge took place within a few weeks after the instrument technicians announced their intention of joining the Union, rather than during the period when the alleged complaints occurred. Under all these circumstances, it is altogether clear that even assuming shortcomings in Newsom's work, it was not the shortcomings but his Union activities which led to his discharge. This finding is buttressed by (1) Hardway's statement to Newsom in December 1950, when the former was visiting the plant, "It looks like this war may involve us too, and if you and the rest of us return, remember this, Newt,[10] there is a place for you in the instrument department. I don't care whether you go back in the Merchant Marine, the Navy, or what, but there is a

[10] Newsom's nickname.

place for you in the instrument department"; (2) Kalins' statement to Newsom a few days before Newsom was discharged, to the effect that if Newsom resigned it "would make things easier" and besides Newsom might be entitled to collect his vacaton pay; (3) Campbell's statement to Newsom made about a week prior to Newsom's leaving the Respondent's plant on February 15, wherein Campbell told Newsom that he should not be "broken hearted" over his plight, adding that he had recommended Newsom very highly a year or so before and was sure that Newsom would make his mark in the world for Newsom was strong, versatile, and able; (4) Warden's statement to Newsom around the first of 1950, that he was assigning Newsom to certain "routine" work although he disliked to burden Newsom with that type of work, but Newsom was the only man in the department capable to do that work satisfactorily; (5) Warden's admonition to Newsom several days after January 31, that Newsom must not talk to any employee during working hours and if he discovered that Newsom was talking to any employee while at work about the disciplinary action which had been taken, Newsom would be discharged forthwith; (6) Kalins' withholding Webb's promotion to a higher classification because "the union activity had changed the picture and they didn't know what would happen until things were setttled"; and (7) the lack of disciplinary action against the other instrument technicians who engaged in horseplay who allegedly performed unsatisfactory work.

Hathaway's testimony that he decided on January 30 to discharge Newsom because of the unfavorable reports he received that day is inconsistent with his testimony that sometime between January 15, the day he first heard of the instrument technicians' intention to join the Union and January 30, he informed his superior, General Superintendent Noble of the organizational plans of this group of employees.

Regarding this conversation, Hathaway testified as follows:

> I told Mr. Noble these men had discussed representation by the union and that one of these men had not been satisfactory as an instrument man; that we had definitely decided he was not good and would probably ask him to terminate. I asked him whether I should postpone the action until the end of the union negotiations or whether I should go ahead and act exactly as if the union negotiations had not been brought up.
>
> Q. Did Mr. Noble at any time advise you or instruct you to terminate Mr. Newsom's employment?
>
> A. Yes. He said if the man's work was not satisfactory, by all means to terminate him. He left the judgment up to the department, however, as to whether he was satisfactory.

It is reasonable to infer from what admittedly transpired at the aforesaid meeting with Noble that Hathaway decided at the conclusion thereof to dis-

charge Newsom. It thus follows that what Hathaway learned about Newsom at the January 15 meeting with the station chiefs, Kalins and Warden, played no part in Hathaway's determination to discharge Newsom, for the decision to do so had been reached by him prior to the aforesaid meeting. This finding is buttressed by Hathaway's admission that prior to the January 15 meeting, he had discussed with the then business agent of the Union the contemplated discharge of Newsom and had received the business agent's assurance that Newsom legally could be discharged if the sole cause for the discharge was Newsom's unsatisfactory work.

Upon the entire record in the case, the undersigned is convinced, and finds, that Newsom was discharged because of his leadership and participation in the organizational campaign of the instrument technicians. The facts, as epitomized above, disclose the familiar pattern of unfair labor practices committed by an employer seeking to thwart the incipient organizational efforts of his employees. That the Respondent, from the start, was opposed to the instrument technicians joining the Union, the collective bargaining representative of certain other of its employees, is not open to question. Hathaway at the January 15 meeting stated to the instrument technicians that he did not believe the Respondent favored such an allegiance. Hathaway received the information regarding the Respondent's said policy shortly before the said meeting from Noble, for Hathaway testified, and the undersigned finds, that Noble told him prior to aforesaid meeting, "the

company might have certain reservations concerning the instrument men becoming members of the Union." The Respondent's antipathy toward the instrument technicians joining the Union is further disclosed when consideration is given to Warden's January 15 statements, uttered prior to the Hathaway meeting of that day, that he would gladly aid the instrument technicians in their drive to organize and his January 16 statements that the men would meet strong opposition in their efforts to unionize and if they persisted in these efforts they might be discharged.

The undersigned further finds that by discharging Cosby M. Newsom on February 15, 1951, the Respondent, in violation of Sections 8 (a) (3) and (1) of the Act, discriminated with respect to the hire and tenure of his employment, thereby discouraging membership in the Union and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The undersigned further finds that by Warden's statement to Fowler, Newsom, and Shroble on January 16, 1951, that they might lose their jobs if they continued their Union activities, the Respondent violated Section 8(a) (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with the operations of the Respondent, set forth in Section

I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has discriminated in regard to the hire and tenure of employment of Cosby M. Newsom, it will be recommended that the Respondent offer him immediate and full reinstatement to his former or substantially equivalent position[11] and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge to the date of the Respondent's offer of reinstatement, less his net earnings during said period.[12]

Loss of pay shall be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of reinstate-

---

[11] The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827.

[12] Crossett Lumber Company, 8 NLRB 440.

ment. The quarterly periods, herein called quarters, shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which Newsom would normally have earned for each such quarter or portion thereof, his net earnings, if any, in any other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.[13]

It will also be recommended that the Respondent, upon reasonable request, make available to the Board and its agents, all payroll and other records pertinent to an analysis of the amounts due as back pay.

The unfair labor practices found above reveal on the part of the Respondent such a fundamental antipathy to the objectives of the Act as to justify an inference that the commission of other unfair labor practices may be anticipated in the future. It will be recommended, therefore, that the Respondent be ordered to cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Brotherhood of Electrical Workers, Local Union 465, affiliated with the American

[13] F. W. Woolworth Company, 90 NLRB 289.

Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Cosby M. Newsom, thereby discouraging membership in International Brotherhood of Electrical Workers, Local Union 465, affiliated with the American Federation of Labor, the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (3) of the Act.

3. By such discrimination, by threatening its employees with discharge if they engaged in protected concerted activities, and by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the Respondent, San Diego Gas and Electric Company, San Diego, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the International Brotherhood of Electrical Workers, Local

Union 465, affiliated with the American Federation of Labor, by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(b) Threatening its employees if they engage in union activities or in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the International Brotherhood of Electrical Workers, Local Union 465, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by a valid agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Cosby M. Newsom immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges.

(b) Make whole said Cosby M. Newsom in the manner set forth in the above section entitled "The remedy" for any loss of pay he may have suf-

fered by reason of the Respondent's discrimination against him.

(c) Post at its plants in San Diego, California, copies of the notice attached hereto, marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-first Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order what steps the Respondent has taken to comply therewith.

It is further recommended that unless the Respondent shall within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order notify the aforesaid Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated this 18th day of September 1951.

/s/ HOWARD MYERS,
Trial Examiner.

APPENDIX A

Notice to All Employees. Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not discourage membership in the International Brotherhood of Electrical Workers, Local Union 465, affiliated with the American Federation of Labor, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment or any term or condition of employment.

We will not threaten our employees with discharge for engaging in activities protected by the aforesaid Act, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the International Brotherhood of Electrical Workers, Local Union 465, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by a valid agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We will offer to Cosby M. Newsom immediate and full reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of our discrimination against him.

All our employees are free to become or remain members of the above-named Union or any other labor organization. We will not discriminate against any employee because of membership in or activity on behalf of any such labor organization.

SAN DIEGO GAS AND ELECTRIC COMPANY,
(Employer)

Dated .....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service attached.

[Title of Board and Cause.]

STATEMENT OF EXCEPTIONS TO INTERMEDIATE REPORT AND RECOMMENDED ORDER

The intermediate report and recommended order signed by Howard Myers, Trial Examiner, having been duly filed and the order transferring the case to the National Labor Relations Board having on the 18th day of September, 1951, been duly made

by the Executive Secretary, the Employer above named, in accordance with Section 10 of the Labor Management Relations Act of 1947, and Section 102.46 of the Rules and Regulations of National Labor Relations Board, Series 6, files this statement of exceptions to the above named intermediate report and order.

I.

General Exceptions

The Act and the regulations above mentioned invite a statement of exceptions from the party against whom the intermediate report and order is directed to the said report and the findings therein contained. The purpose of these exceptions is for the enlightenment of the National Labor Relations Board and for the further purpose of giving the respondent employer a chance to be heard in opposition to the findings before the same become final. In pursuance to that invitation, counsel for respondent deems it proper to present a frank statement of exceptions and criticism of the report and findings therein contained. This is the only procedure under which the Board can be advised of errors made by the Examiner or of a report made by him which is not justified by the evidence.

In general, the Examiner has overlooked the provisions of the Act and rules of law which are vital and fundamental in this procedure. Section 10 (c) of the Act requires that the findings of fact must be based "upon the preponderance of the testimony taken". Under this provision and the decisions of the Circuit Courts of the United States, the burden

is upon the accuser to prove his case and therefore unless the accuser fully conforms to this burden of proof the proceeding should be dismissed. The presumption is that the Employer has not violated the law and the burden of proof is therefore not upon the Employer, but upon the one who asserts the fact to prove that the discharge was because of union activity.

"It is unnecessary for an employer to justify the discharge of an employee so long as it is not for union activities. The presumption is that the employer has not violated the law, and the burden of proof is not upon the employer, but upon the one who asserts the fact, to prove that the discharge was because of union activities. * * *" N.L.R.B. vs. Union Mfg. Co., 124 Fed. (2d) 332, 333.

"In sponsoring the charges of Oil Workers' international Union, No. 243, and issuing its complaint thereon, the Board was acting purely in its accusatorial capacity and in that capacity it, of course, had the burden of proof to establish before itself, in its capacity as trier, the accusations it had laid. In its capacity as accuser, the Board like any other 'person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence from which men of unbiased minds can reasonably decide in his favor'. It cannot any more than any other litigant can, 'leave the right of the matter to rest in mere conjecture and expect to succeed'. Samulski vs. Menasha Paper Co., 147 Wis. 285, 133 N. W. 142, 145." Magnolia

Petroleum Co. vs. National Labor Relations Bd., 112 Fed. (2d) 545, 548.

This point will be elaborated in the brief in support of these exceptions.

It is apparent from an examination of the findings and the transcript of the evidence that the Examiner has resolved all doubts in favor of the employee and wherever any conflict in the evidence occurs, that conflict has been resolved in favor of the accuser. Counsel for the Employer respectfully urges that the Examiner has ignored the overwhelming weight of the evidence to the effect that the work of the employee was unsatisfactory and that there was just cause for his discharge. In that connection, we direct attention to Section 10 (b) of the Act which provides that so far as practical the hearing before the Examiner be conducted in accordance with the rules of evidence applicable under the rules of Civil Procedure in the District Courts of the United States, and also that portion of Section 10 (c) above pointed out in regard to the preponderance of the evidence necessary to justify the order. Based upon these provisions, it is respectfully, but emphatically, urged that the findings are not based upon a preponderance of the evidence, nor justified under the evidence by the ordinary rules of evidence applicable to the District Courts of the United States.

In this connection it is also urged that the Examiner has not given proper credit to the reliability and fairness of the executives, both present and former, who have testified in this case that the dis-

charged employee was not properly qualified for his important tasks and that his discharge was justified.

The Examiner also apparently has relied upon a play of words and has enlarged the significance of the use of certain words by witnesses for the Employer.

Also, we respectfully urge that the Examiner has confused his conclusions and theories with the findings of fact and has drawn certain inferences that are not justified by a proper consideration of the evidence.

II.

Specific Exceptions

More specifically, the Employer excepts in detail to certain of the findings and hereinafter quotes the evidence justifying the exception. The findings are in many instances unnumbered and at times it is difficult to pick them out of the report. Counsel will, however, attempt to present the exceptions for the enlightenment of the Board with as much clarity as possible.

1. First Exception. On Page 3, at Line 33, the Examiner finds that Mr. Hathaway requested "that the instrument technicians be brought to his office later in the day". The use of the word "brought" would be unimportant were it not for the fact that the Examiner emphasizes that word later in the report for the purpose of indicating and finding that the meeting in Hathaway's office of January 15th was ordered by Hathaway and that the employees were brought unwillingly to his office. This

is an attempt to show the arbitrary action of the Employer and its attempt to break up the union activities. This is far from the facts as shown by the evidence. The testimony of Warden is this:

"Mr. Kalins and I went to Mr. Hathaway and talked to him about that and Mr. Hathaway said if the men desired a meeting with him that he would be very happy to arrange such a meeting." (T. 134, Line 10.)

He further testified:

"It was an offer of openness on the part of Mr. Hathaway that if the men desired a meeting he would like very much to talk with them, but Mr. Hathaway's instructions to me was not to make that a form of request from him." (T. 134, Line 18.)

It is true that Hathaway testified that the meeting was called "at my request" (T. 320), but under the circumstances above testified to by Warden. There is nowhere any testimony that the men were brought to his office in the sense that they were required or urged to come. This is an important distinction, in view of the use made of these words by the Examiner.

2. Second Exception. At Page 3 of the report, Line 42, the Examiner finds that Hathaway then stated that the men should have sought an increase through normal company channels instead of attempting to enlist the aid of the union. This again would ordinarily be a small matter, but the Examiner uses the words "should have sought an increase" in the sense that some criticism and pres-

sure was directed against these men. The testimony of Mr. Hathaway is this:

"They told me the only reason they wanted to join the union was to obtain more money. I asked them why they had not presented the case to us, Mr. Warden, Mr. Kalins, and to me, and they said they believed they would have a better chance to get the money by going through the union than by going through the supervisors." (T. 329, Line 13.)

This again is a rather small matter, but it is pointed out so that an unjustified impression of Hathaway's attitude should not go by unchallenged. On Page 3, Line 55, the Examiner finds that Mr. Hathaway informed the employees seeking a union representative that the "top management might object to the instrument technicians being represented by the same union which was the representative of the other employees because of the nature of the instrument technicians' jobs, coupled with the fact that the instrument technicians had access to certain confidential papers and records". What was actually said, and to which there is no contradiction, was:

"I told them as far as I was personally concerned it didn't make much difference whether or not they were in the union because, after all, well over half of the men working for the company belonged to the union.

Trial Examiner Myers: Just keep to the conversation.

The Witness: That was mentioned, however, I said the company might have objections to them

joining the union because of the nature of the job, but that that was a question between the company and the union and I didn't have an answer on it." (T. 329, Line 24—T. 330.)

3. Third Exception. The Examiner appends a note on page 3, numbered 2, in which he cites in support of his inference that the meeting of January 15th was compelled or required by Hathaway and that the employees were compelled to walk or were brought to the office in the sense of pressure; that although Warden testified that Hathaway suggested and did not request the meeting that Hathaway, however, testified that he requested the meeting. This is the play upon words to which the Employer strongly objects. As pointed out above, there is no testimony by anybody that the employees were brought to the office in the sense of being required to come or that the meeting was requested in the sense that it implied an urging, because Mr. Hathaway used the term "request" in speaking of the meeting. The Examiner has enlarged the significance of that word beyond justification, for what Mr. Hathaway meant and said is clearly outlined by the testimony of Warden and found at Page 134 of the Transcript.

4. Fourth Exception. The most important findings made and the heart of the entire charge against the Employer is found in that finding, which is repeated, that Mr. Warden, an instrument engineer, the immediate superior of the employee, stated to three employees that the positions of the technicians "did not look too good and that if he (Warden)

were in our shoes he would get these affairs in order because there is a possibility we may all be looking for other jobs". This statement and the findings in regard thereto will be amplified later in these exceptions. The present exception deals with the finding of the Examiner in connection therewith: "That Warden also informed them they would meet with strong opposition in their organizational move." There is testimony on the part of Newsom to the effect that Warden stated that the men were "going to encounter some strong opposition in our move to organize", but the witness Newsom in answer to a question by Trial Examiner Myers, "Did he say by whom?" answered "No, sir, not to my recollection" (T. 24). This is an example of resolving the doubt in favor of the employee. The statement as made by Warden and as testified to by Newsom is so vague that it can not be said to be binding in any way upon the company or in representing any fact in relation to the policy of the company, bearing in mind that the employee here has the burden of proof. It certainly can not be said that it is proved sufficiently to justify a finding that the Employer would present strong opposition to the organizational moves.

5. Fifth Exception. Again on Page 4, Line 50, the Examiner finds that the testimony of Newsom is supported by that of Fowler and Shroble in regard to this statement of Warden. No one of the three witnesses agrees substantially in what was said by Warden. Shroble's testimony was very vague in relation to it. He said: "Well, I don't know too much,

but one statement was made, he said he hoped our family affairs were in order so we could look for another job." (T. 83.) Certainly that is too vague a statement to support any finding. Apparently Shroble means that he does not remember very much about it. He says that Warden hoped "our family affairs were in order". That is a meaningless phrase under the circumstances and is not supported by any other witness.

However, the statement of Newsom in his testimony that Warden stated that there was a possibility they would all be looking for other work is flatly contradicted by Fowler, who stated that he himself made the statement.

Fowler's testimony should be given careful consideration because he is a witness called by the employee and was one of the men involved in the union activities and can be expected to give as favorable testimony as possible for the employee. His testimony in regard to this conversation with Warden is as follows:

"Q. Did you have a conversation with Mr. Warden after the signing of General Counsel's Exhibit No. 2?

A. The following morning. We have an assignment session each morning and talk over what has been done and what needs to be done. He seemed very pessimistic as to our chances of getting into the union and in the conversation made a statement that he hoped our affairs were in order and we assured him we were prepared to look for other work, if necessary." (T. 112.)

On cross examination Fowler again testified in respect to this conversation:

"Q. (By Mr. Luce): Calling your attention to the conversation with Mr. Warden on the morning of the 16th, I believe you told us that he was very pessimistic about your chances of being taken into the union?

A. That was one thing he said. I don't remember the exact wordage.

Q. In substance, that was what he said?

A. Yes.

Q. Then you said we assured him we were prepared to look for other work?

A. Yes.

Q. He didn't say to you that you better be prepared to look for other work?

A. No, sir.

Trial Examiner Myers: Did you make that statement that you were prepared to look for other work?

The Witness: I believe that was made exactly that way, I believe so, yes.

Trial Examiner Myers: How did you happen to say that?

The Witness: Well, from the nature of the proceeding it could only mean one thing. That we would have to get our affairs in order as far as the company was concerned, that is, financially.

Trial Examiner Myers: Meaning what?

The Witness: Meaning we could use (lose) our jobs over the union activity.

Trial Examiner Myers: What did he say when you made that remark?

The Witness: I believe the conversation was dropped there.

Q. (By Mr. Luce): You say that Mr. Warden expressed himself as being pessimistic in regard to your chances of joining the union?

A. Yes.

Q. Then, he said, 'I hope you have your affairs in good shape?'

A. Yes.

Q. Putting these two together, did you not realize that he meant he hoped you had your application in order to assist you in joining the union?

A. I didn't take it that way, no.

Q. He did, at that time, offer to help you, did he not?

A. Yes.

Q. And did he furnish you or Mr. Newsom with a job classification sheet?

A. Yes." (T. 116-117.)

This statement relied upon by Newsom and found by the Examiner to have been made by Warden is completely emphatically denied by Warden (T. 142-143.)

The evidence, therefore, that such a statement was made is extremely vague and unsatisfactory. It is partly contradicted; and considering the rules of evidence and the sections of the Act referred to above, it is not sufficient to justify a finding, as the accuser has not met the burden of proof. This is the very meat of the case and the Examiner should have

resolved the doubt against the accuser, as is required by law. The burden of proof was not met.

Furthermore, the statement of Warden, an employee of the company, is not binding upon the Employer and can not justify a finding that the Employer might discharge any of these employees for union activity. This will be referred to in Exception No.

Even if it be true, and we insist that the preponderance of the evidence compels the conclusion that it is not true, that Warden made the statement attributed to him, how can this be evidence that he spoke for the Employer or that the Employer had the prejudice or intentions indicated by the remarks?

In the first place, the remarks by Warden were apparently volunteered by him, as no evidence appears justifying the conclusion that the Employer might discharge these men for union activity. The evidence clearly shows that the company's labor relations were excellent; that it had had friendly dealings with the union for years; that in no other instances appeared evidence of prejudice against union activity; that the higher executives connected with this matter all made statements exactly contradictory to such conclusion. How can a statement by an instrument engineer, relatively low in the rank of executives, commit the whole organization, or justify the reinstatement of an employee. This purported statement by Warden represents the entire case for the accuser and principally on that statement the Employer is ordered to reinstate the

employee. The conclusion must have been drawn by the Examiner that because Warden made this statement the Employer has threatened to discharge employees for union activities. Here again counsel emphatically insists that the evidence does not justify the finding that the Employer did so threaten. Particularly is this true when the provisions of the Act and decisions of the court in regard to the burden of proof are considered.

6. Sixth Exception. The Examiner on Pages 4 and 5 relies upon conclusions given by Fowler and Shroble to "buttress" his findings and conclusions. At Page 5, Line 45, the Examiner quotes the testimony of Shroble as to how he "construed" the statement of Warden. Surely under no rule of law is the construction given to the statement of the Employer's engineer admissible as evidence or of any weight whatsoever. On Line 55, the construction given to Warden's remarks by Fowler is quoted as giving support to the finding of the Examiner. Under none of the rules of evidence nor under the preponderance of the testimony were such remarks considered even testimony. It apparently is emphasized by the Examiner that even though nothing might have been said by Warden to incriminate the Employer, yet if the employees gave such a construction, that is sufficient. In this case the testimony of Warden shows that his remarks could not fairly have been given such a construction, and yet they were of such a nature that an unthinking person, or one wishing to draw a hasty conclusion, might interpret them in a way that is not justified.

In this connection also, Warden's testimony should be considered. We quote from the Examiner's statement of it:

"I suggested to the men that they have their facts, figures, or substantiating evidence and so forth, in regard to their demands in very good conditions; that it would necessary for them to have a good clean case for their demands for more money. I advised the men to think this over very carefully and not go up to the union with a case of demands for more money without supporting facts; that they should have all of their affairs connected with the union activities in first-class condition before they presented it, because if they should present a demand for more money and not have it substantiated with facts and figures, undoubtedly their demands would be refused. In the event their demands would be refused, it would be doubly hard for them to again open demands for more money."

For further reference to the testimony of Warden, in which he denies emphatically that he made the statement attributed to him, see Transcript Pages 142-143.

On Page 5, beginning at Line 30, the Examiner states that he was favorably impressed by the forthright and honest manner in which Newsom, Fowler and Shroble testified. In the same paragraph he states that Warden did not so impress him. This seems to counsel for Employer to be an arbitrary position, resolving all of the conflict in favor of the accuser. In view of the denial of Warden and the contradiction of Fowler to the testimony of

Newsom, the weight of testimony is against the finding of the Examiner. The Examiner gives no reasons why he should resolve the doubt in favor of the employee. He merely says that he is impressed with the truth of the testimony of the employee and is not impressed with the testimony of the engineer of the Employer. In all sincerity counsel takes strong issue with the Examiner in this respect. There is no reason, from manner of testifying, or from the appearance on the stand, or from the testimony given, to discard Mr. Warden's testimony merely because it conflicts with that of Mr. Newsom. Apparently the Examiner resolves the doubt in favor of Newsom because of the construction given to the remarks of Warden by Fowler and Shroble, as appears on Line 40 of Page 5 of the findings. This construction by witnesses must be disregard under all rules of law.

7. Seventh Exception. On Page 7, beginning at Line 30, the Examiner summarizes the testimony of Hardway and Stovall as to the qualifications of Newsom, the employee. There is much more to the testimony than than given by the Examiner and the full testimony is strongly against the findings made. Therefore, we summarize in more detail the statements of these two men. Bear in mind that they both are now in the military forces of the United States and are no longer employed by the company. They were both in an excellent position to judge of the qualifications and the cause for discharge of this employee and their evidence should be given careful consideration. Counsel quotes from his brief filed with the Examiner:

"John T. Hardway, former Efficiency Engineer for the company, also testified as to the inefficient work performed by Newsom. At the time of testifying he had severed his connection with the company and was a Lieutenant Commander in the United States Navy, stationed at the San Francisco shipyard. He started his employment with the company in June, 1946, as a Junior Engineer and had worked up to the position of Efficiency Engineer, to which he was promoted in November, 1948 (T. 237-238). He first observed the work of Newsom in June, 1950, and he had occasion to criticize his work at that time, after hearing complaints from Mr. Warden. Six weeks later there was another complaint from Mr. Proutt (T. 242-243). He received complaints also from Mr. Campbell, the Station Chief, as to horse play by Newsom and Webb (T. 243). He established a system of rotation and noticed that when paired with other technicians the work of both 'fell down' and when the same technician was separated from Newsom his work improved (T. 245). In the opinion of Mr. Hardway, Newsom's work was unsatisfactory (T. 247, 256). It was clearly the opinion of Mr. Hardway that the work of Newsom was unsatisfactory.

'Q. (By Mr. Luce): In your opinion was the character and quality of Mr. Newsom's work, at the time you left, sufficient to warrant his dismissal? * * *

The Witness: I won't say it was that bad, but I will say it was unsatisfactory enough that I would have gone into a rather detailed investigation. I would have taken the time myself to have gone into

a greater detail, which otherwise was not warranted, and would have come to a final conclusion then whether his removal was justified.' (T. 247.)

"B. L. Stovall, formerly Efficiency Engineer for the company and now a Lieutenant Commander, United States Navy, stationed at the Industrial Command, United States Naval Station, in San Diego, testified that he started with the company in 1937 and gradually went up through the grades, including some years of University training, until he became Efficiency Engineer in 1946. On the way up he was Station Chief, Junior Engineer and Instrument Technician (T. 263-265). He had an opportunity to observe the work of Newsom. He first came in contact with him in October, 1948. He heard complaints from the operating department to the effect that he was doing inefficient work on the control instruments (T. 267). He observed that Newsom was given to horse play, and conversed with firemen and others who came near him entirely too much. He further showed a remarkable lack of initiative in attempting to grasp the problems involved (T. 268). He further testified that the Instrument Technician is responsible for the thermal efficiency of the plant from the fuel tank to the generator output. The job held by Newsom was one of the most important functions in the power house (T. 270). Newsom, according to the testimony of Stovall, spent hours talking to the operators and thus interfered with their work (T. 272). Lieutenant Commander Stovall described the horse play that he had observed (T. 273)."

Counsel also is attaching to these exceptions a summary of the testimony of the other executives which will be later referred to.

The first finding, under the heading "Concluding Findings", on Page 8, seems to be that the Examiner is compelled to conclude that the discharge of Newsom was for union activity because if Newsom is guilty of the shortcomings attributed to him, why was he in the employ of the Employer so long? The Examiner has overlooked the uncontradicted evidence on this point. It appears throughout the testimony that the Employer did everything possible to help Newsom. He was warned on more than one occasion of his "sloppy" work and patience was shown by the Employer. This ordinarily would be considered a good habit on the part of the Employer, but the Examiner resolves the inference against the Employer. The evidence also shows that during the summer of 1950 one of the generators at the Silver Gate Plant went out and everyone was extremely busy for the rest of the year in handling the rest of the machinery so that it could carry the additional load and no time was given to even consider the case of Newsom during that period. The testimony of Warden in that respect is as follows:

"It was following the September meeting that we lost Unit I at Silver Gate. That was a burnup unplanned, I might add, and it was 40,000 megawatts cut out from our system which made quite a hole in our total capacity.

"As you might visualize, starting the first of September, the load demand by the consumer gradually

increases by the additional use of electricity for lighting, so it was with much emphasis that we placed Unit I in primary importance getting that machine back on the line and into operating condition to the best of our ability.

"We were also saddled with the continued testing on Unit No. III and these tests were to determine modifications necessary to that unit which had only been installed, I believe, in August of 1950. It was very necessary that we obtain this information and tests and so forth, from Unit No. III so that ample time from the manufacturer might be had to produce equipment necessary to make that change.

"Q. Did you have any opportunity to observe the character of the work he had performed from September to January on the overhaul project?

A. Only in a very limited manner because of the duties required of me on Unit III tests and other related duties." (T. 132-33.)

The question of the retention of Newsom in the employ of the Employer after the unsatisfactory work outlined in the testimony came to a head shortly before the meeting of January 30th. The educational programs of the technicians was presented at that meeting and that brought to a decision the question of whether or not Newsom would be retained, and had nothing whatsoever to do with his union activity. Mr. Warden testified:

"A. Before this particular meeting I had talked to Mr. Kalins in regard to the proposed instrument training program. We went to the meeting together to present the proposed training program. I went

as Mr. Kalins' assistant, because he is the head of the entire department and was the one to make the presentation of the proposal.

Q. When did you first discuss the instrument training program with Mr. Kalins?

A. Probably intermittently, when an occasional opportunity was involved, for a period of three or four months. Also, there had been discussions in regard to instrument training even as far back as when Mr. Hardway was efficiency engineer. * * *

Q. Why did you decide to take it up at this particular meeting?

A. Because we had completed the overhaul schedule for 1950, even though the overhaul schedule did extend into the very early part of '51, in January, we completed that overhaul schedule and we had approximately the months of February, March and April in which we could conduct this training program without being interfered with by overhaul programs. However, I believe our overhaul program did start in March and not in April.

Q. And your proposal for the training program, as you presented it to the supervisors, did it then include the proposal that the instrument technicians receive their training after their regular working hours with overtime pay?

A. It was decided at this meeting that the training program would be attempted on the schedule of twice a week, one hour—between the hours of 3:00 and 5:00 in the afternoon. Our normal quitting time is 4:00 o'clock, therefore, it would be one hour on regular time and one hour at time and one-half for each meeting." (T. 206-207.)

Mr. Kalins testified:

"We prepared a proposed training plan for our instrument technicians, and after some discussion about the plan, it was unanimously decided that it would be accepted.

Then Mr. Hathaway posed the question how the instrument men were doing. Mr. Warden replied that all of them were doing well considering their experience and training with exception of Mr. Newsom. Mr. Hathaway then said, 'We have a problem here, what shall we do with this man?'

Each man in turn, I don't recall the order in which they spoke, but each man in turn gave his idea of what he thought of Newsom's work, and after each man had expressed his opinion it was unanimously decided that the man—well, that is, not right—that we would be better off without him and that he should be removed from the department.

Q. Were his general qualifications, his efficiency and work discussed at that meeting?

A. Yes, there were various points mentioned. We talked about the defectiveness of his work, the attitude of the man was stressed that it was not conducive toward harmonious relationships with other operating personnel, or the maintenance people——

Q. You say it was unanimously decided the company would be better off without him. Was any decision reached as to what they should do?

A. Yes, it was decided that we would take action immediately." (T. 288.)

Mr. Hathaway, the Superintendent, testified:

"It was finally decided that the presentation as Mr. Kalins gave it was substantially correct and we would proceed accordingly. It called for two meetings a week, one hour on company time and one hour overtime.

At that time Mr. Newsom's name was mentioned following a question of mine as to how the men were getting along, how they were doing. Each man was given a brief consideration, and Mr. Newsom was reported as not doing satisfactorily.

The question was then raised as to whether or not——

Q. Wait a minute. Tell us what was said about his work and who said it.

A. As I mentioned, I asked about each man in the group and I asked about Mr. Newsom, as to whether or not his work was satisfactory following the occurrences in the past. The answer was that it was not satisfactory and he would probably never become a satisfactory instrument man.

Q. Who said that?

A. I think I asked Mr. Kalins and Mr. Warden, and they both said that. I asked the opinion of the two station chiefs and they also agreed that he would not become a satisfactory instrument man and should not be in the training course which was about to start. That was also my opinion.

Q. Go ahead and tell us what was said.

A. That is what was said. Each man expressed his opinion that Mr. Newsom was not a satisfactory man and we should not waste his time or the time

of the other men or the training instructors in the course. We could not leave him out of the course as an instrument man, and as we had decided something would have to be done about him, we took that action at that time.

Q. Was anything else said?

A. Substantially, that Mr. Newsom would be terminated; that he should be offered the opportunity of transfer, or, in case he didn't choose either——

Q. Will you tell us what was said and who said it? Don't give us your conclusions that it was decided. Tell us what was said and how the meeting terminated.

A. I asked each man, 'Should we terminate Newsom'? That was the substance of the question. I asked them individually. The answer was also given, individually, that we should. I concurred with that myself.

I instructed Mr. Kalins to give Mr. Newsom a notice to that effect." (T. 332-333.)

From the above and other testimony in the case, it is apparent that there was justification for the delay in terminating Newsom. It happened to coincide with his union activities. This fact, that is the unfortunate timing, seems to have had convincing force with the Examiner and to have brought about his conclusion. It is unfair, however, in view of the above testimony, to say that because the discharge occurred at the time of union activities it was due to this activity. If the other testimony in the case is considered, it will appear that the union activity

did not have any weight in the decision to terminate Newsom. To find that it did is purely an inference and conclusion drawn by the Examiner on suspicion alone. It is not supported by the evidence. This is an important consideration and counsel respectfully suggests that the evidenec be reexamined. Counsel also assumes that the Board has before it the brief of the Employer which was filed before the Examiner and the statement of the evidenec with appropriate references is there contained and should be carefully considered.

8. Eighth Exception. The final finding made by the Examiner is found on the bottom of page 8 and the top of page 9 of the Findings and is as follows:

"Under all these circumstances it is altogether clear that even assuming shortcomings in Newsom's work, it was not the shortcomings but his Union activities which led to his discharge."

He then declares that the finding is "buttressed" by certain evidence which he finds in the record. This finding and the subdivisions of the finding constituting the buttress are now considered in their order.

(A) Subdivision 1 of the finding mentions a remark made by Mr. Hardway to Newsom in December, 1950, indicating, according to the Examiner, that Hardway assumed Mr. Newsom's work was satisfactory. It is to be noted that this alleged statement was made in December, 1950. At that time Mr. Hardway was no longer employed by the company but was passing through the plant with

some relatives and made the remark in passing. (Transcript 44).

On the other hand, the testimony of Mr. Hardway quoted above shows his opinion of the qualifications of Newsom. The remark has only little value in support of the charge here.

(B) The Examiner finds some significance in the statement of Mr. Kalins to Mr. Newsom that if he resigned it would make things easier. It is difficult to comprehend the significance of this statement as supporting the finding. The statement was made after the time Mr. Newsom was notified of the termination of his employment. We find reference to this statement at the bottom of page 153 and the top of page 154 of the transcript. The resignation had apparently been referred to on the day that Newsom was notified of his discharge. Testimony of Warden in that respect is as follows:

"A. Yes, the following day, either the following day or second day following, I contacted Newsom to see if he had made a decision and what it was. I said it was important to me to know if he had decided to resign or be discharged so that we might put into operation the mechanics necessary in writing up his discharge; that if it were a resignation there was the fact of making payment for his vacation which he had not received as yet. If it was a discharge the accounting would necessarily be different from a resignation."

"Q. What did he say?"

"A. He said, 'I cannot resign.' "

In fact, the Examiner's finding is that the state-

ment in regard to resignation was made "a few days before Newsom was discharged." In fact, the question about resignation was brought up after Newsom was discharged.

"Q. (By Mr. O'Brien): During the two weeks, did you have any further conversations with Mr. Kalins?"

"A. Yes, I did."

"Q. Approximately when?"

"A. It was within a day or so of my termination. He came to me and told me he couldn't see why I didn't resign because that would make things much easier; that there was some strong possibility I might be able to collect my vacation pay if I did resign, and he couldn't see why I didn't do that."

(C) The same may be said of subsection 3 of the finding. Campbell's statement referred to therein was made after Newsom was discharged and about a week prior to his leaving the plant. What Campbell said according to Newsom was this:

"Mr. Campbell seemed quite concerned. He had recommended me quite highly a year or so prior and he seemed quite concerned that I was broken hearted over this. He wanted me to face the world with a stiff upper lip and get started in some other field. He said I was strong and versatile, able, and no doubt make my mark in whatever field I chose. He said I should get started on it right away." (Transcript 41).

Then follows some other comforting remarks by Campbell. These remarks fairly considered indicate

only a kindly feeling on the part of Mr. Campbell and an effort on his part to encourage Mr. Newsom to find other employment that would be congenial. It would seem to be only a kindly act on the part of a superior officer and the words have no significance at all in support of the finding.

(D) In Subsection 4 on page 9 the Examiner relies also upon a statement attributed to Warden that he was assigning Newsom to certain routine work because he was the only man in the department capable to do that work satisfactorily. It must be noted, according to the finding of the Examiner, that this remark was made "around the 1st of 1950", a year before Newsom was terminated. It is difficult to understand in what way this remark would "buttress" the findings that the discharge of Newsom was for Union activities.

(E) In Subsection 5 on page 9 the Examiner places significance in the fact that Warden admonished Newsom several days after his discharge that he must not talk to the employees and that if he did so his discharge would take effect forthwith. How this can buttress or support any finding that discharge was for Union activities is not clear to Counsel. The statement made by Warden to Newsom, however, is not susceptible to the inference placed upon it by the Examiner. According to Newsom, the statement of Warden was as follows:

"I was also told by Mr. Warden the next day that the company didn't have to give me two weeks, that they could let me go immediately and they would do so if it looked like I was going to circu-

late among the men and tell them about all of this." (Transcript 39, line 14).

Quite naturally, Warden did not want the discharged employee spending his time discussing his troubles with his fellow employees. What is wrong with the Employer giving this admonition to a discharged employee? Certainly there is nothing to prevent his agitating on his own time. Here again, even giving the worst construction possible, such evidence does not support a finding that the discharge was for Union activities.

(F) In Subsection 6 the Examiner relies to some extent upon his statement that Kalins withheld Webb's promotion to a higher classification because "the Union activities had changed the picture and they didn't know what would happen until things were settled." The Examiner presents the inference that the Employer had withheld Webb's promotion because of Union activity. This is far from the fact and the evidence should be examined in that respect.

"Q. Tell me, did Mr. Kalins say that Mr. Webb had been considered for an "A" rating, but that Union activities had changed the picture and the company didn't know what would happen until things were settled?"

"A. He didn't say the company, he was talking about himself personally."

"Q. That they didn't know what would happen until things were settled?"

"A. Yes."

Clearly, the remark has no significance and Kal-

ins was only voicing his own thoughts. It appears, however, that Webb was given his Grade "A" rating.

(G) In Subsection 7 the Examiner places significance and support for his finding on the supposed fact that there was a lack of disciplinary action against the other instrument technicians who engaged in horseplay and who allegedly performed unsatisfactory work.

Inasmuch as the Examiner gives no citations from the transcript for such statements it is difficult to accept to them. However, the other instrument technicians referred to were also engaged in Union activities equally with Newsom and were not discharged. Horseplay was only one small item referred to in the causes for Newsom's discharge. There is no evidence of any unsatisfactory work on the part of the other technicians that would in any way justify a discharge. The conclusion of the Examiner in Subsection 7 is wholly unsupported by any evidence.

The above is the evidence which the Examiner claims supports and buttresses his finding that the discharge of Newsom was not for his "shortcomings" but his Union activities. Considering the well-known rules of law laid down by the act itself by the decisions, it is difficult to understand on what theory it could be said by the Examiner that the above statements of evidence made his finding that the discharge was for Union activities "quite clear." This statement does not constitute a preponderance of the evidence with respect to the

cause of discharge nor does it sustain the burden of proof. The finding itself to which we here accept is the vital one in the whole proceeding in that the Examiner has found that even though the testimony is overwhelming that there were causes for the discharge based on poor work. Nevertheless, the Examiner finds that Union activities was the real cause. Counsel earnestly submits that this all important finding rests, according to the Examiner, upon a very thin inference from the evidence, and certainly said inference constitutes nothing more than a suspicion.

9. Ninth Exception. Some significance by the Examiner is placed upon the conversation testified to by Hathaway between himself and Mr. Noble, and the Examiner claims that this conversation shows that Hathaway had determined upon the discharge of Newsom before the important meeting of January 15th. There is nothing in the evidence which justifies this finding. The Examiner does not give the proper emphasis to the testimony of Mr. Hathaway.

It will be noted that Hathaway asked Mr. Noble whether he should go ahead and act exactly as if Union negotiations had not been brought up, and the answer was: "yes, he said if the man's work was not satisfactory, by all means to terminate him. He left the judgment up to the department, however, as to whether he was satisfactory." (Transcript 337.)

This testimony does not at all support the Trial Examiner's conclusion. It does indicate clearly that

the Employer's attitude was not to consider the Union activities at all. This directly negatives the findings of the Examiner. How can the Examiner find from this that Mr. Hathaway had decided to discharge Newsom. Certainly, there is no such evidence. Yet, the Examiner concludes "it is reasonable to infer from what admittedly transpired before said meeting with Noble that Hathaway had decided at the conclusion thereof to discharge Newsom." This finding is wholly unjustified and unsupported.

10. Tenth Exception. The Examiner continues at the top of page 10 to find contrary to all the evidence that the meeting of January 15th did not determine the discharge of Newsom, but that Hathaway had determined before that meeting. The only evidence to support this finding seems to be the conclusion of the Examiner that prior to the meeting of January 15th Hathaway had discussed with the Business Agent of the Union the contemplated discharge of Newsom. Even though such be the fact and that Hathaway was considering the discharge based upon the reports to him of his department heads, it does not in any way prove that the discharge had been determined or that the discharge was for Union activities. The meeting of January 15th as shown by the evidence and the testimony of all those present is clearly contrary to the finding of the Examiner. It may be that the discharge of Newsom was considered before the meeting of January 15th. As a matter of fact, it had been considered for a long time,

and the warning had been given to Newsom. Therefore, there seems to be no significance in the statement of the Examiner that Hathaway discussed the discharge with the Business Agent of the Union. Here again is a very weak and thin line to attach a finding of such importance.

11. Eleventh Exception. The Examiner on page 10, line 9, makes the general finding that he is convinced that Newsom was discharged because of his leadership and participation in the organizational campaign of the instrument technicians. In coming to this conclusion, however, the Examiner fails to give any importance to the overwhelming testimony of Newsom's superiors as to his unfitness. This seems to be legally an arbitrary finding not based upon the evidence.

It is not true that the respondent from the start was opposed to the instrument technicians joining the Union. The most that was said at any time by anyone in authority was that the matter would have to be determined at the next contract negotiations, and that the company held a mental reservation in regard to giving its consent. All of the executives stated to the technicians and repeated the same in evidence that they did not stand in the way or make any objections to the action of the technicians at that time. This will be later pointed out in a further exception.

12. Twelfth Exception. On page 10, line 17, the Examiner finds that Hathaway at the January 15th meeting stated to the instrument technicians that he did not believe the respondent favored such

an allegiance. According to the Examiner's statement all that Hathaway stated was that Noble told him "the company might have certain reservations concerning the instrument men becoming members of the Union." This is far from showing any objection on the part of the company. Noble in the same conversation quoted above stated that Hathaway should consider the problem as though there had been no Union activitiess. It was repeatedly stated to these men that the question of their affiliation with the Union was a matter to be determined between the Union and the men, and between the company and the Union at time of contract negotiations.

13. Thirteenth Exception. This exception is directed to the general finding of the Examiner that the real cause for the termination of Newsom was his union activity and not his "shortcomings" or his lack of qualifications to do the work. This general finding is the crux of the whole case. The Examiner supports this finding on statements of the evidence above referred to which fall far short of supporting it. In this exception counsel directs the attention of the Board to the fact that five witnesses testified to the meeting held on January 30th at which the qualifications of Newsom were carefully discussed and the decision made that he should be discharged because of the lack of qualifications and an accumulation of incidents justifying the discharge. These witnesses were the executives of the company in charge of the departments in which Newsom worked and were impartial and able witnesses. They were the ones best

able to judge of his qualifications. There does not appear any reason at all why the testimony of these witnesses should be totally disregarded and the Examiner should rely wholly upon the conflicting evidence of a chance remark by a technical engineer.

What happened at this meeting of January 30th is best described by the testimony of Mr. Charles R. Hathaway, the Superintendent of Electrical Production for the company. His testimony has already been cited and is found beginning at Page 331, Line 15, to Page 333, Line 20. The persons present at this meeting, in addition to Mr. Hathaway, were:

Mr. Harold L. Warden, Instrument Engineer, whose testimony begins at Page 121 of the Transcript and ends at Page 177;

Mr. Joseph L. Kalins, Efficiency Engineer, whose testimony begins at Page 280 of the Transcript and ends at Page 323;

Mr. Kenneth Campbell, Station Chief at Station B, whose testimony begins at Page 349 of the Transcript and ends at Page 356;

Mr. Walter S. Zitlaw, Station Chief at the Silver Gate Plant, whose testimony begins at Page 368 of the Transcript and ends at Page 376.

All of these men testified that the qualifications of Mr. Newsom were carefully discussed and it was unanimousiy agreed that he should be discharged for inefficiency. Each of these witnesses stated emphatically that his union activities had nothing to do with the decision to terminate him.

Each of these witnesses testified that they had no objection to Newsom's union activities and each testified that in general they had no objection to the activities of their employees in respect to becoming members of a union.

In addition to the above, Mr. John T. Hardway, formerly Efficiency Engineer of the company and now a Lieutenant Commander, U. S. N., whose testimony begins at Page 237 of the Transcript and ends at Page 256, and Mr. B. L. Stovall, formerly Efficiency Engineer for the company but now a Lieutenant Commander, U. S. N., whose testimony begins at Page 263 of the Transcript and ends at Page 273, both testified to the inefficiency of Newsom and as to their observation of his poor work and of the complaints made against him.

It is impossible in the limits of this statement of exceptions to set out all of the testimony given by those men. We will attach to this statement, however, an appendix which constitutes a summary of this testimony.

All of the above witnesses have been found by the Examiner to be unworthy of belief and against their testimony he finds that the discharge of Newsom was for union activity, in spite of the positive testimony given by the above witnesses that it was not. Certainly the preponderance of the evidence is against the finding of the Examiner. Surely the burden of proof is not met by the accuser.

This matter is extremely important to a great

public utility producing electricity for a great community and in justice to it the Board should reexamine the testimony contained in the Transcript. Counsel again asserts as strongly as possible that the findings of the Examiner are not supported by a preponderance of the evidence as the law requires that they should be. The state of the evidence as above pointed out is such that the overwhelming evidence is opposed only by a conclusion of the Examiner based upon suspicious circumstances.

14. Fourteenth Exception. The Examiner has not considered in his findings the testimony of Warden that Newsom at one time signed the name of "Webb," another technician, to a report without authority or consent. While the discovery of this improper signature by Newsom was made after it was decided to discharge him, it is proof, however, of the general course of conduct of Newsom and supports the opinion of his superior officers. The testimony of Warden in regard to this incident is as follows:

"A. The details, as best that I have them, were that in the early part of the month of February, 1951, I was checking the routine record which is maintained at Silver Gate. I came across the alarm check record of 1950 and there was a column on that record dated 1/23/51, under which was the name "Webb," and below the name a complete alarm check record. I took this record out to the instrument shop where Newsom was working and asked him what about it. He looked at it and

took out an erasure and said, 'I put that down just for laughs.' I removed the paper from Newsom and brought it back into the office.

Trial Examiner Myers: This was in 1951?

The Witness: Yes.

Trial Examiner Myers: When was the date of the job?

The Witness: The alarm check of the job was dated 1/23/51 and that was placed on a 1950 record.

Trial Examiner Myers: On a 1950 record?

The Witness: Yes.

Trial Examiner Myers: What does that mean?

The Witness: This particular record is a large sheet with sufficient columns and spaces across it to record one year's record.

Trial Examiner Myers: I don't understand what you mean.

The Witness: On this record sheet at the top of each column there are sufficient spaces to show one year's record on a sheet of this nature.

Trial Examiner Myers: How often are the notations put in the record?

The Witness: It is our desire to have these made on a monthly basis, however, during overhaul periods of heavy work we have to necessarily give routine a secondary consideration and sometimes there is one or two months in running throughout the year that we do not have time to make the alarm checks.

Trial Examiner Myers: When do you think Newsom put Webb's name down, '50 or '51?

The Witness: I checked that record as of December 1950 and it wasn't there at that time, so it was sometime following the December date.

Trial Examiner Myers: And you discovered that in February?

The Witness: The very first part of February, at which time it is my job to check the record and make sure it is complete and up to date." (T. Pg. 155, Line 6, to T. Pg. 156, Line 24.)

Newsom attempted to explain away this false signature, but his testimony was very vague and unconvincing. He attempted to deny that he had signed the name of Webb, but finally admitted that it looked like his signature and he would not say that he had not made it. (T. 422, Line 15, to T. 423, Line 6.) See Exhibit 2 (Transcript pg. 174).

15. Fifteenth Exception. The respondent further excepts to the findings on the ground the Examiner in arriving at his conclusion has completely ignored the fact shown by the evidence that this Employer has enjoyed good labor relations for some time and has constant dealings with representatives of labor and has not objected to its employees joining the union. Its record, therefore, does not indicate that it would be likely to discharge an employee for union activity. (T. 329, Line 24.)

Mr. Hathaway further testified as follows:

"Q. Mr. Hathaway, you say, then, in your department a large portion of the men are members of the union?

A. That is correct, yes.

Q. Is there any reason that you know of now,

either in company policy or in your policy, that would require you or would cause you to discharge a man because he was engaged in union activity?

A. Certainly not.

Q. To your knowledge, has it ever been done by your company?

A. It has not been done since I have been with the company, certainly not.

Q. Has there ever been any discouragement given to the men to discourage them from joining the union?

A. No.

Q. Would you say that in deciding to terminate Mr. Newsom's employment that his union activity was in any degree a contributing factor?

A. No, it was not." (T. 337, last line to T. 338, Line 17.)

This is positive, undisputed testimony by a high official of the company, whose sworn testimony should not be brushed aside by a mere conclusion or suspicion. Certainly it was not given any weight whatsoever by the Examiner, who virtually found Mr. Hathway's testimony was not truthful.

16. Sixteenth Exception. Respondent also objects in general to the finding and conclusion of the Examiner that the discharge of Newsom was for union activities, on the ground that the undisputed evidence shows that Newsom was previously warned of his inefficient work and was told that he would be discharged if it did not improve. This happened long before there was any union activity. The testimony of Warden is as follows:

"A. At this time I went to Mr. Kalins, who had become efficiency engineer due to Mr. Hardway being on military leave, and explained that we had had one previous meeting with Newsom; that I had also spoken to Newsom once myself before that.

My recommendation to Mr. Hathaway was that he either transfer or remove him from the instrument department.

Q. Was your recommendation to Mr. Hardway or Mr. Kalins?

A. To Mr. Kalins.

Q. Then what happened?

A. Mr. Kalins went to Silver Gate with me, we called Newsom into the office, and Mr. Kalins started questioning Newsom in regard to his work output, the sloppiness in nature, the lack of exactness and preciseness of the work.

Mr. Newsom, again, asked for specific examples, one of which was quoted in regard to the gauges installed on Unit II in such a manner that they were not satisfactory as far as operations were concerned. That was offered as one of a number of instances. It was not the only one, it was just a specific instance.

During this meeting in which Kalins, Newsom and myself were present, the point was brought up that if Newsom's work did not become satisfactory and remain so, it would be necessary for him to leave the department. Mr. Newsom questioned me twice on that, asking me what I meant, and I said that he would be through, that he could not longer

work in the instrument department. I repeated that twice during the meeting.

Q. What was his attitude at that time as expressed by his words?

A. Following that meeting a very definite appearance of measured output.

Q. Before you come to that, what was the attitude of Mr. Newsom at this meeting of you, Kalins and Newsom in regard to his showing of respect to you?

A. A considerable disrespect." (T. 128, Line 11, to T. 129, Line 19.)

Mr. Kalins testified to the same thing. (T. 280-284)

17. Seventeenth Exception. The Employer introduced into evidence Exhibit 2 (Transcript 178). This exhibit consisted of photostatic copies of the records made up by Newsom. In numerous instances these records showed serious inefficiency on the part of Newsom, sometimes omissions to enter proper readings of the instruments, sometimes confusion as to the figures entered, sometimes careless work, all of which showed inefficiency and carelessness of Newsom. This is serious on the part of an instrument technician.

These particular records were not discovered until after Newsom was terminated. At the hearing the Examiner indicated that he would not give serious consideration to these records because of the

fact that they were discovered after the discharge. The records, however, have considerable weight in that they prove that Newsom was inefficient and that the judgment of his superiors was good. They are certainly proof of his inefficiency and indicate a just cause for his discharge. The Examiner has entirely overlooked these records and has given them no consideration at all. This, counsel believes, is error on his part and that this Board should give those records consideration.

The testimony in regard to these records and the explanation of the errors appearing thereon made by Newsom is given by Mr. Warden and commences on page 158 and continues to page 178.

Counsel assumes that the exhibit is before the Board and can be examined by the Board in connection with the testimony of Newsom.

Conclusion to Exceptions

Respondent, referred to sometimes herein as Employer and sometimes as the company, has presented in all sincerity these exceptions to the findings. Again, it is strongly urged that against overwhelming and uncontradicted testimony of executives of the company, entitled to respect and credence, are the suspicions of the Examiner, based wholly upon the passing remark of Engineer Warden and upon the fact that the termination of Newsom came about soon after he commenced union activities. The chance remark of Warden is not proved by the evidence, as there is a sharp conflict. The

remark would not be binding upon the company in any event. It is true that the discharge came at an unfortunate time, but as the cases which will be hereafter quoted in our brief hold, the fact that any employee is engaged in union activities is not protection against discharge for cause. The support for the Examiner's finding seems to be only this suspicious fact.

The re-employment of Mr. Newsom as an instrument technician would put him in a position of importance where only efficient and loyal employees should work. The officials of this company are charged with the responsibility for the upkeep and maintenance of this great electrical production plant. The order proposed would inflict upon this company and its officials a great deal of harm. Certainly it should not be made without careful consideration, such as is required by the decisions of the Courts of the United States.

Therefore, based upon the evidence in this case, it is sincerely urged by the respondent company that the evidence be re-examined and reconsidered and that the findings proposed by the Examiner be not made the final findings of this Board.

Counsel for the respondent filed with the Examiner a brief on behalf of the respondent employer. There is much contained in that brief that should be considered by this Board and counsel believes it would be enlightening. Counsel also assumes that the brief is on file before the National Labor Relations Board and respectfully suggests

that it be examined by the Board before ruling on these exceptions.

Respectfully submitted,

LUCE, FORWARD, KUNZEL & SCRIPPS

/s/ By EDGAR A. LUCE,
Attorneys for Employer.

APPENDIX

Summary of testimony of Harold L. Warden, Instrument Engineer; John T. Hardway, former Efficiency Engineer; B. L. Stovall, former Efficiency Engineer; Joseph L. Kalins, Efficiency Engineer; Charles R. Hathaway, Superintendent of Electrical Production; Kenneth Campbell, Station Chief at Station B; Walter S. Zitlaw, Station Chief at Silver Gate.

In considering this testimony, it must be first remembered that the discharged employee was an Instrument Technician who was charged with the duty of keeping the instruments in the great power plants in working order. The power plants in question were Station B and the Silvergate plants in San Diego, and had a capacity of 150,000 kilowatts and 100,000 kilowatts, respectively, and supplied the City and County of San Diego with electricity. The responsibility of these men was very great and it was exceedingly important that the work of inspecting these instruments be done well and efficiently. No one can deny the right of the employer under these conditions, who has the responsibility of fur-

nishing a great city with its electrical power, to discipline its employees charged with the maintenance of the instruments on its powerful and tremendously expensive machines. Those charged with the duty of maintaining the efficiency of these two great plants were in the best position to judge the qualifications of Newsom and all have testified that his work was unsatisfactory and that he should be taken off the job. No one should dare to substitute their judgment for the judgment of these men. No one has attempted to dispute their testimony. No evidence was produced to indicate any lack of sincerity or ability on the part of these men, or of any personal prejudice on their part, against either Newsom or his union activities, except the scintilla, if it may even be that much, of evidence above cited.

The person in the best position to judge the work of Mr. Newsom was his immediate superior, Harold L. Warden, Instrument Engineer, who first went to work for the company in 1947 and was promoted to Instrument Engineer in March, 1949. He outlined the importance of the work of the Instrument Technicians, of which Newsom was one. (Transcript 121.) He stated that was "of such a nature that errors, lack of accuracy, being lackadaisical, or, perhaps you might say, not caring too much or not paying strict enough attention to the job, can be very detrimental in the matter of station efficiency. It even could, under hazardous operation, cause plant damage or personnel damage." (T. 122.) He testified that Newsom's work was "spasmodic", (T. 124) and was so unsatisfactory that it did not create

confidence in his work on the part of operators or Station Chiefs or Supervisors (T. 124). In October, 1949, he spoke to Mr. Newsom in private and told him that complaints had come from the Station Chief at Silvergate, Mr. Zitlaw, and that he (Newsom) should improve on his work (T. 125). The work of Newsom continued to be unsatisfactory and his inefficiency was discussed with Mr. Hardway, the Efficiency Engineer, and later with Mr. Kalins, who succeeded Mr. Hardway. Mr. Hardway spoke to Newsom in May, 1950 (T. 127) and after that, in September, 1950, Mr. Kalins, Efficiency Engineer, and Warden informed Mr. Newsom of the unsatisfactory character of his work and among other things told him that unless his work improved, he would be terminated (T. 129-130). Mr. Warden testified that he recommended the discharge of Newsom as early as September, 1950 (T. 128). Mr. Warden further testified that on more than one occasion Mr. Newsom showed disrespect towards him, thus injuring the cooperation and unanimity of the department (T. 129-130; 151-152).

Mr. Warden further testified that on once occasion, without a good explanation, Newsom signed the name of Webb, a fellow technician, to an inspection report and also entered it on the wrong sheet (T. 155; T. 174); that Newsom was absent once for three days without notification or explanation (T. 157).

The witness Warden produced photostatic copies of the records of the company showing sloppy and careless work by Newsom on the instrument records.

Some of these records, as will be shown in the testimony, were discovered after the discharge of Newsom was agreed upon, but show the character of his work before the discharge and were offered as examples. These records were received in evidence and were designated "Respondent's Exhibit 2". The explanation of these records will be found in the transcript at pages 158 to 177. On page 4 of the exhibit are several blanks, showing that no reading was taken at the required time. On page 5 are several blanks were no reading was entered. Later Mr. Newsom testified that the blanks meant that the same figures were read, although this explanation does not fit in with the rest of the page. On page 6 of the exhibit are numerous other blanks. On page 7 it shows that the check test is carelessly done, as the "P.S.I.", or "Pounds per square inch" should have been changed to "Inches Mercury". The figure 7.6 does not apply to "P.S.I." Further explanation of this is contained in Mr. Warden's testimony in the transcript, page 165. On page 8 the same error occurs and it will also be seen that there was sloppy entry of figures, as the top figure "279" in the encircled portion should have been dropped down a line. Other errors on this page are shown by the testimony on page 169 of the transcript. Errors also occur on page 9 shown in the circles and explained in the testimony of Warden at page 170. The errors on pages 11 and 12 are explained in the testimony of Warden on page 174 of the transcript. On page 12 of Exhibit 2, in the last column, appears a heading "1-23-51"; however, the rest of the columns are

obviously for the year 1950 and the top heading is for the year 1950. Under the figures "1-23-51" can be seen faintly the word "Webb". This is the signature signed by Newsom and which he attempted to erase when confronted with it by Warden (T. 174). On page 13 of the exhibit are also certain blanks that indicate that certain tests were not made, although on Exhibit 1 is a check showing that they were made (T. 174). Pages 14 and 15 of the exhibit also show errors which are testified to (T. 177).

John T. Hardway, former Efficiency Engineer for the company, also testified as to the inefficient work performed by Newsom. At the time of testifying he had severed his connection with the company and was a Lieutenant Commander in the United States Navy, stationed at the San Francisco shipyard. He started his employment with the company in June, 1946, as a Junior Engineer and had worked up to the position of Efficiency Engineer, to which he was promoted in November, 1948 (T. 237-238). He first observed the work of Newsom in June, 1950, and he had occasion to criticize his work at that time, after hearing complaints from Mr. Warden. Six weeks later there was another complaint from Mr. Proutt (T. 242-243). He received complaints also from Mr. Campbell, the Station Chief, as to horse play by Newsom and Webb (T. 243). He established a system of rotation and noticed that when paired with other technicians the work of both "fell down" and when the same technician was separated from Newsom his work improved (T. 245). In the opinion of Mr. Hardway, Newsom's work was unsatisfac-

tory (T. 247, 256). It was clearly the opinion of Mr. Hardway that the work of Newsom was unsatisfactory.

"Q. (By Mr. Luce): In your opinion was the character and quality of Mr. Newsom's work at the time you left, sufficient to warrant his dismissal?" * * *

The Witness: I won't say it was that bad, but I will say it was unsatisfactory enough that I would have gone into a rather detailed investigation. I would have taken the time myself to have gone into a greater detail, which otherwise was not warranted, and would have come to a final conclusion then when whether his removal was justified." (T. 247.)

B. L. Stovall, formerly Efficiency Engineer for the company and now a Lieutenant Commander, United States Navy, stationed at the Industrial Command, United States Naval Station, in San Diego, testified that he started with the company in 1937 and gradually went up through the grades, including some years of University training, until he became Efficiency Engineer in 1946. On the way up he was Station Chief, Junior Engineer and Instrument Technician (T. 263-265).

He had an opportunity to observe the work of Newsom. He first came in contact with him in October, 1948. He heard complaints from the operating department to the effect that he was doing inefficient work on the control instruments (T. 267). He observed that Newsom was given to horse play, and conversed with firemen and others who came near him entirely too much. He further showed a

remarkable lack of initiative in attempting to grasp the problems involved (T. 268). He further testified that the Instrument Technician is responsible for the thermal efficiency of the plant from the fuel tank to the generator output. The job held by Newsom was one of the most important functions in the power house (T. 270). Newsom, according to the testimony of Stovall, spent hours talking to the operators and thus interfered with their work (T. 272). Lieutenant Commander Stovall described the horse play that he had observed (T. 273).

Joseph L. Kalins was the Efficiency Engineer with the company at the time of the termination of Newsom's employment. He also went up through the grades with the company and became Efficiency Engineer in September, 1950, succeeding Mr. Hardway. He testified that he first questioned Newsom's ability in May or June of 1950 (T. 280). He first discussed the matter with Newsom in September, 1950, after hearing several complaints from Mr. Warden. In the conversation he went over the complaints with Newsom in the presence of Mr. Warden. Newsom excused every action about which there was a complaint and became very angry (T. 283-284); and at that time he was definitely informed that unless his work improved "he would be through" (T. 284). Later on, when Newsom was notified of his termination or transfer, the witness Kalins definitely outlined to Newsom what the grounds of complaint were and summarized them as follows:

1. That he does not have ability to get along with supervisors;

2. That he had no desire to become a leadman, to set a pace for the other men or show leadership, does not produce in accordance with ability;

3. He was producing a measured output to just barely get by;

4. His workmanship was unsatisfactory and sloppy and jobs were uncompleted and he had no dependability;

5. He did not fit into the department setup. (T. 291.)

These reasons were discussed in detail and some examples were given. Immediately Newsom demanded that the causes be stated to all of the instrument group, as he wanted to put Warden on the carpet before the men (T. 292). At that meeting, according to Mr. Kalins, Mr. Newsom had a monopoly of the floor and cited many childish reasons why Warden did not like him (T. 292). He also excused himself by indulging in criticism of his superior, Mr. Warden (T. 293).

Kalins also testified that there had been great improvement in the work of the department since Newsom had left it. As he expressed it, "The deparment, as a whole, was more capable, was more hardworking, more harmonious, and all around a much better department" (since Newsom left) (T. 296). Mr. Kalins also attributed an improvement to the fact that Newsom had left. He detailed a conversation that he had had with Superintendent Hathaway, in which he had reported the inefficiency

of Newsom at several meetings (T. 322-323). He further stated that the attitude of Newsom was very bad and it was one of the factors in his discharge (T. 321).

Mr. Kalins emphatically stated in his testimony that he had no objection whatsoever to Newsom's union activities (T. 305).

Charles R. Hathaway, Superintendent of Electrical Production for the employer, testified that he had been 10½ years with the company and started as Efficiency Engineer; he had had a great deal of experience prior thereto, and this he outlined in his testimony (T. 324). The first complaint he received about Newsom was early in 1950, from Mr. Campbell, Station Chief at Station B, which was to the effect that the operating personnel were losing faith in the accuracy of the meters and of the inspection by Newsom (T. 324). Hathaway decided that it was best to separate Newsom and other men and this rotation program was carried out (T. 325). Later, Zitlaw, Station Chief at the Silver Gate Station, also complained of the inefficient work of Newsom (T. 325). Kalins and Warden detailed to the witness that Newsom had given trouble in every combination they had made and there was much discussion among the three in respect to Newsom (T. 327).

Mr. Hathaway testified in detail to the meeting of January 15th, where the matter was discussed with the Instrument Technicians who were requesting union recognition (T. 328-329). Also, he testified of the meeting of January 30th, where the dismissal of Newsom was decided upon. Mr. Hathaway testified

at some length as to the requirements of the job and the necessity for harmony and cooperation (T. 340), and gave it as his opinion that Newsom was not qualified to properly do the work (T. 338). He emphasized the fact there had been much better harmony in the department since Newsom left (T. 339). It was his opinion that the supervisors leaned over backwards to give Newsom a chance and showed no prejudice against him. He relied quite strongly upon the criticisms of Newsom given by Zitlaw and Campbell (T. 343-344).

Mr. Hathaway stated very emphatically that the union activity of Newsom did not affect the matter in any way (T. 335); that it did not matter to him personally whether they were members of the union or not, as most of the men under him were members of the union (T. 330). He stated that he had discussed the matter with Mr. Noble, General Superintendent, and that Mr. Noble had instructed him to consider the elimination of Newsom from the department exactly as though there had been no union activity on his part (T. 337).

Mr. Kenneth Campbell testified that he was Station Chief at Station B. He outlined his rather extensive experience in similar work prior to employment by the company (T. 349-350). He stated that just prior to May, 1950, he received repeated complaints from the men under him as to the work of Newsom (T. 352); that the work of Newsom continued to be unsatisfactory (T. 353); that after May, 1950, he noticed a sort of inactivity on the part of Newsom and that he seemed to have no

definite objective ahead and indulged in considerable horse play (T. 354); in his opinion the work of Newsom was "spasmodic"; that in his opinion it was for the best interests of the company that he be terminated (T. 365). Mr. Campbell, like the other witnesses, stated emphatically that his judgment as to Newsom was not in any way affected by his union activities (T. 356).

Mr. Walter S. Zitlaw testified that he was the Station Chief at Silver Gate; that he started with the company in 1941; that he had been Chief at the Silver Gate Station since 1943; that prior to his employment by the company he had held a similar position with the Phelps-Dodge Company (T. 368). He noted that the work of Newsom had become lax and was subject to further criticism (T. 369); that it continued bad and that many complaints were received about him (T. 370); that he noticed that very little work was executed by Newsom and that the work assigned to him was not being completed (T. 372). His general opinion of the work of Newsom was about as follows:

"He has exceptional ability when it is work to his interest. If he finds interest in the work, he can do a good job and he can do it with dispatch. The work we have is not the type of work that will hold his interest over any period of time, and he doesn't fit that picture at all. * * * I support it is his temperament and attitude towards the job. He doesn't seem to accept the job for what it is. * * * Because of the failure to continue to prosecute each assignment that was his, each responsibility that

was his, he would let them go by for lesser things or for just laughs, doing nothing." (T. 373.)

He noted also that Newsom spent more time in his office than he should have (T. 377); that he was guilty of other inefficient work than described above (T. 379-381). Mr. Zitlaw also, like the others, testified emphatically that the union activity of Mr. Newsom had no part and was given no consideration, in the opinion of Zitlaw, and of his decision that he should be eliminated from the department (T. 376).

United States of America

Before the National Labor Relations Board

Case No. 21-CA-1029

In the Matter of

SAN DIEGO GAS AND ELECTRIC COMPANY

and

COSBY M. NEWSOM, An Individual.

DECISION AND ORDER

On September 18, 1951, Trial Examiner Howard Myers, issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board[1] has reviewed the rulings of the Trial Examiner and find that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.

The Trial Examiner has found, and we agree, that complainant Newsom's discharge was violative of Section 8 (a) and (1) and (3) of the Act. In reaching this conclusion, unlike the Trial Examiner, we have considered certain work records of Newsom's which were introduced in evidence by the Respondent in support of its contention that Newsom's work was unsatisfactory.

These records consist of standard forms prepared by the Respondent for use by its instrument tech-

---

[1] Pursuant to the provisions of Section 3 (b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

[2] The Intermediate Report contains an inadvertent error which is hereby corrected. In concluding that Hathaway, immediately after his conference with Nobel, decided to discharge Newsom, the Trial Examiner states, "It thus follows that what Hathaway learned about Newsom at the January 15th meeting with the station chiefs, Kalins and Warden, played no part in Hathaway's determination to discharge Newsom, * * *." The date of this meeting, correctly set out elsewhere in the Intermediate Report, was January 30, not January 15, 1951.

nicians in conducting tests on generators, turbines, boilers and other equipment in the Respondent's generating plants. Harold L. Warden, Newsom's immediate supervisor, testified at some length at the hearing concerning alleged errors and omissions on Newsom's part in executing these forms. Thereafter, Newsom was recalled as a witness and explained in a convincing manner each of the alleged mistakes mentioned by Warden. A careful examination of the entire record convinces us that, even if Newsom made the comparatively few errors and omissions on the forms attributed to him by the Respondent, such errors and omissions would not have misled the skilled engineers for whom the forms were executed. Accordingly, we reject the Respondent's contention that Newsom's work records constitute persuasive evidence that he was an unsatisfactory employee. In the circumstances we must conclude, as did the Trial Examiner, that Newsom's discharge was motivated by his union activity, and thus was violative of Section 8 (a) (1) and (3) of the Act.[3]

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, San Diego Gas and Elec-

---

[3] In so ruling we do not rely upon the Trial Examiner's finding, for which we find no persuasive support in the record, that Hathaway admitted that he had discussed the proposed discharge of Newsom with the Union's business agent some time before January 15, 1951.

tric Company, San Diego, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the International Brotherhood of Electrical Workers, Local 465, affiliated with the American Federation of Labor, by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment;

(b) Threatening its employees for engaging in union activity or in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the International Brotherhood of Electrical Workers, Local Union 465, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, to refrain from any and all such activities except to the extent that such right may be affected by a valid agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Cosby N. Newsom immediate and full reinstatement to his former or substantially

equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, in the manner provided in the Intermediate Report;

(b) Upon request make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records, and reports, and all other records necessary to analyze the amount of back pay due;

(c) Post at its plant in San Diego, California, copies of the notice attached to the Intermediate Report marked Appendix A.[4] Copies of said notice to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof,

---

[4] This notice, however, shall be, and it hereby is, amended by (a) striking from line 3 thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu thereof the words "A Decision and Order," and (b) changing the last full paragraph to read "All our employees are free to become, remain, or refrain from becoming or remaining, members in good standing of the above-named Union, or any other labor organization, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act." In the event this Order is enforced by a decree of the United States Court of Appeals, there shall be inserted in the notice before the words: "A Decision and Order," the words: "A Decree of the United States Court of Appeals Enforcing."

and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of the receipt of this Order what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C., March 31, 1952.

PAUL M. HERZOG, Chairman,
ABE MURDOCK, Member,
PAUL L. STYLES, Member,

[Seal] NATIONAL LABOR RELATIONS BOARD.

Affidavit of Service attached.

In the United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SAN DIEGO GAS AND ELECTRIC CO.,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the doc-

uments annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of San Diego Gas and Electric Company and Cosby M. Newsom, Individual," Case No. 21-CA-1029 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Howard Myers Trial Examiner for the National Labor Relations Board, issued August 1, 1951.

(2) Stenographic Transcript of Testimony taken before Trial Examiner Myers on August 1, 2, and 3, 1951, together with all exhibits introduced into evidence.

(3) Copy of Trial Examiner Myer's Intermediate Report (annexed hereto to Item No. 5), and Order Transferring Case to the Board, both dated September 18, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(4) Respondent's Statement of Exceptions to Intermediate Report and Recommended Order received October 8, 1951.

(5) Copy of Decision and Order issued by the National Labor Relations Board on March 31, 1952, with Intermediate Report annexed thereto, together with affidavit of service and United States Post Office return receipts thereof.

(6) Copy of Order Correcting Decision and Order issued by the National Labor Relations Board on July 17, 1952, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 28 day of August, 1952.

[Seal] /s/ LOUIS R. BECKER,
Executive Secretary, National
Labor Relations Board.

Before the National Labor Relations Board,
Twenty-first Region

Case No. 21-CA-1029

In the Matter of:

SAN DIEGO GAS & ELECTRIC COMPANY,

and

COSBY M. NEWSOM, an individual.

Superior Courtroom No. 1, County Court House
Broadway and Front Streets, San Diego, California.

Wednesday, August 1, 1951.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: Howard Myers, Trial Examiner.

Appearances: George H. O'Brien, 111 West Seventh Street, Los Angeles, California, appearing on behalf of the General Counsel of the Natioanl Labor Relations Board. Luce, Forward, Kunzel & Scripps, By: Edgar A. Luce, 1220 San Diego Trust & Savings Building, San Diego, California, appearing on behalf of the San Diego Gas & Electric Company, the Respondent. [1*]

PROCEEDINGS

* * * * * [3]

COSBY M. NEWSOM,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testfied as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Cosby M. Newsom.

Trial Examiner Myers: Will you kindly spell your full name for the reporter?

The Witness: C-o-s-b-y M. N-e-w-s-o-m.

Trial Examiner Myers: Mr. Newsom, where do you live?

The Witness: 4276 Altadena Avenue.

Trial Examiner Myers: San Diego?

The Witness: Yes.

Trial Examiner Myers: You may be seated, sir.

Mr. O'Brien, you may proceed with the examina-

---

* Page numbering appearing at bottom of page of original Reporter's Transcript of Record.

(Testimony of Cosby M. Newsom.)

tion of Mr. Newsom who has been duly sworn.

Q. (By Mr. O'Brien): Did you formerly work for the San Diego Gas & Electric Company?

A. I did. [7]

Q. Approximately when were you first employed? A. February, 1948.

Q. In what department?

A. Electrical production.

* * * * *

Q. (By Mr. O'Brien): Your job was what?

A. Helper in the maintenance forces.

Q. How long did you work as a maintenance helper, approximately? A. Eight months.

Q. Your next job was what?

A. That of instrument technician, Grade B.

Q. How did you obtain that job?

A. Through job bid procedure.

Q. Can you describe what the job bid procedure was?

A. When there is a vacancy in another department, personnel posts a notice of that vacancy and invites bids from company employees throughout all departments for the job.

Q. By the way, as a maintenance helper did you belong to any labor organization?

A. The I.B.E.W.

Q. The International Brotherhood of Electrical Workers? A. Yes.

Q. Do you know whether or not they had a contract with the [8] company covering maintenance electricians and helpers? A. Yes, they did.

(Testimony of Cosby M. Newsom.)

Q. And do you know whether or not that contract covered the work of the instrument technicians?

A. I was informed it did not.

Q. Approximately when did you become an instrument technician, Grade B?

A. I believe it was in October, 1948.

Q. Who was your immediate superior?

A. Mr. Charles Geiger.

Q. Would you spell that name, please?

A. G-e-i-g-e-r.

Q. What was his title, sir?

A. Instrument Engineer.

Q. To whom was Mr. Geiger responsible?

A. Mr. Stovall.

Q. What was Mr. Stovall's title?

A. Efficiency Engineer.

Q. And to whom was Mr. Stovall responsible?

A. I believe the Assistant Station Chief, Mr. Campbell, at that time.

Q. Mr. Campbell, C-a-m-p-b-e-l-l? A. Yes.

Q. The same Mr. Campbell sitting in the back of the hearing room? [9] A. Yes.

Q. Coming back to Mr. Geiger, besides your own work, the work of what other employees did he supervise?

A. The work of Mr. Warden at Silver Gate and Mr. Porter at Station B.

Q. Mr. Warden's title is what?

A. I believe it was Instrument Technician A at that time.

(Testimony of Cosby M. Newsom.)

Q. Where was he stationed?

A. At Silver Gate.

Q. Is that a steam electric generating plant?

A. Yes.

Q. Mr. Porter was stationed where?

A. Station B, primarily.

Q. Is that a steam electric generating plant?

A. Yes.

Q. Do you know whether Mr. Porter was an A or B technician?

A. He was a B technician.

Q. Is he in the hearing room now? A. Yes.

Q. The same Mr. Porter? A. Yes.

Q. Then, was Mr. Warden the only instrument technician A when you entered the department?

A. Yes.

Q. Were you and Mr. Porter the only instrument technicians B [10] when you entered the department? A. Yes.

Q. Calling you attention to the fall of 1950, who was in charge of the instrument technicians at that time? A. Mr. Warden.

Q. His title then was what?

A. Instrument Engineer.

Q. Under Mr. Warden there were no instrument technicians A? A. No, sir.

Q. The instrument technicians B were whom?

A. Bob Cole——

Q. Do you know approximately when he transferred to the department, if he did?

A. Transferred into the department?

(Testimony of Cosby M. Newsom.)

Q. When he became an instrument technician?

A. No, sir, I don't. It was 10 months prior to the fall of 1950.

Q. It was after you became a technician?

A. Yes.

Q. Do you know approximately when he transferred out of the department?

A. In the fall of 1950 he transferred.

Q. To what job?

A. As junior engineer.

Q. Definitely a promotion? [11] A. Yes.

Q. You have named Bob Cole. Who else?

A. Ollie Webb.

Q. As far as his service in the department was concerned, was he junior or senior to you?

A. He was junior in seniority.

Q. Who else?

A. Thomas Fowler, Pete Shroble and Cosby Newsom.

Q. Again, calling your attention to the fall of 1950, was there any discussion, among the group you have just named, of differences between wages paid at the San Diego Gas & Electric Company and other concerns? A. Yes.

Q. When?

A. In August or September. [12]

* * * * *

Q. What discussion did you have with relation to your wage scales with your fellow employees?

A. Well, I informed the fellows that during my vacation I had made some contacts in Los Angeles

(Testimony of Cosby M. Newsom.)

and investigated the wage scales of men doing comparable work.

Where our top man after three years of service to the company was making $1.60 an hour, they were hiring people in Los Angeles at $2.00 or $1.90 an hour.

In the course of our discussion it was pointed out by someone that the only difference was that up there the jobs were covered by unions. They were highly organized and immediately there was a spontaneous move to petition the union. We decided against it, as a group, collectively, because of the fact that Thomas Fowler and Pete Shroble were quite new in the department and didn't, at that time, feel that they were instrument technicians. It was decided to postpone it until they had gained more confidence and a better understanding of the job.

Q. Later, did you announce your decision to any representative [13] of management?

A. No, sir.

Q. At some later time did you announce to any of the supervisors that you have named that you were considering such action?

A. No, sir. That is, not until the next year.

Q. You say, "not until the next year." Approximately, when?

A. When our present action began?

Mr. O'Brien: I have asked the reporter to mark this document for identification as General Counsel's Exhibit No. 2.

(Testimony of Cosby M. Newsom.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit No. 2 for identification, which bears the date of January 15, 1951, and I ask you if that helps to fix the date when you had some discussion with some supervisor about the union?

A. That is the date.

Q. To whom did you speak?

A. The first person to know about it was Mr. Warden.

Q. The same Mr. Warden? A. Yes.

Q. Mr. Warden's job then was that?

A. Instrument Engineer.

Q. About what time of day?

A. In the morning, 7:30. [14]

Q. Was that your usual starting time?

A. Yes.

Q. Who was present?

A. Mr. Warden, Thomas Fowler and Pete Shroble.

Q. What was the conversation?

A. We told Mr. Warden about our plans.

Q. Who did the talking?

A. I was primarily the spokesman that morning. I told him we had discussed it and all of the instrument technicians decided it was necessary for us to get more money for our work, so we decided to organize and join the union.

(Testimony of Cosby M. Newsom.)

I told him we had decided to ask the I.B.E.W. to represent us. I explained to him, also, what I had learned in Los Angeles, previously, as to wage scales there and wage scales here. He agreed. He said that we were underpaid. He also said it does no good to go up and ask them for anything, because he himself had done that and it is a futile method. Those were his words.

* * * * *

Q. (By Mr. O'Brien): What else was said in that conversation with Mr. Warden? [15]

A. We just left it more or less at that and everyone agreed it was a good idea. We left it at that and we thought the next move would be up to us and the union.

Q. At which station did this conversation take place? A. Silver Gate.

Q. Did you go on about your work then?

A. Yes, we did.

Q. By the way, what were your duties on January 15, 1951, specifically?

A. I believe I was engaged in the routine work at Silver Gate station.

Q. Had your duties been changed shortly before January 15th?

A. We had just completed an overhaul and my duties were changed from working on the overhaul to the resumption of the routine that had been interrupted for the overhaul.

Q. When were you told of this change in your duties? A. Prior to January 1st.

(Testimony of Cosby M. Newsom.)

Q. By whom? A. H. L. Warden.

Trial Examiner Myers: January 1st, of this year?

The Witness: Yes.

Q. (By Mr. O'Brien): About January 1 of 1951, what was your conversation with Mr. Warden on that occasion?

A. He called me into the office and said that the overhaul is over and we are months behind in our routine work. He said [16] it is quite important that we get our departmental machinery back in operation for the routine work and he told me that he hated to burden me, his senior men, with routine. However, he said, I was the only fellow in the department that could handle the routine successfully at those stations.

Webb was not familiar with the routine at Silver Gate and that I would be required to do the routine for three months during which time Mr. Ollie Webb would work with me on the routine at Silver Gate. At the end of that three months, Mr. Webb would take over the routine at those stations, having been broken in at Silver Gate by me.

Q. Now, bringing you back to January 15, 1951, after your conversation with Mr. Warden in the morning, did Mr. Warden speak to you again later in the day about that subject matter? A. Yes.

Q. About when?

A. Sometime in the afternoon he returned to Silver Gate from Station B and called all of us together.

(Testimony of Cosby M. Newsom.)

Q. The three of you being Fowler, Pete and Newsom?

A. Yes. He said we were to have an interview with Mr. Hathaway at Station B.

Q. I don't believe Mr. Hathaway has been identified. Will you tell me what his job is, or was then?

A. He is superintendent of electrical production.

* * * * * [17]

Q. Have you told us all of what Mr. Warden said to you three technicians on the afternoon of the 15th?

A. He said we have an interview with Mr. Hathaway. He wants to see us about our move.

Q. What happened then?

A. Well, the three of us entered Mr. Warden's car and he drove us to Station B where we were interviewed by Mr. Hathaway.

Q. Is Mr. Hathaway's office in Station B?

A. Yes.

Q. Who was present?

A. Those present were Mr. Hathaway, Joseph Kalins——

Q. Just a minute. Do we have Mr. Kalins identified? Will you spell his name, sir?

A. K-a-l-i-n-s.

Q. His job was what?

A. Efficiency Engineer?

Q. Would he be under Mr. Hathaway?

A. Yes.

Q. Would he be over Mr. Warden?

A. Yes.

(Testimony of Cosby M. Newsom.)

Q. You have mentioned Mr. Hathaway and Mr. Kalins, who else was present? [18]

A. Tony Botwinis.

Q. He is an instrument technician?

A. He was at that time.

Q. Who else?

A. Thomas Fowler, Pete Shroble, Ollie Webb and Cosby Newsom.

Q. Was Mr. Warden present? A. Yes, sir.

Q. What was the conversation?

A. Mr. Hathaway asked us who our spokesman was and I spoke, saying that we were all of the same mind and that we had been told or advised as to the futility of asking for raises; that our intentions were to join the union.

Mr. Hathaway said there are other ways to get money rather than joining the union. He said, for instance, they were contemplating the rate of A technician and that two of us had been recommended by Mr. Hardway in letters which he left prior to his re-entering the Navy. [19]

* * * * *

The Witness: Mr. Hathaway said that two letters had been left for two of the men in the department when Mr. Hardway went into the Navy. He said they were considering making A technicians of some of the men in the department.

He outlined some of the advantages we have by not belonging to the union.

Q. (By Mr. O'Brien): What did he say?

A. He said there are possibly advantages to not

(Testimony of Cosby M. Newsom.)

belonging to the union that you men are not aware of, that is what he said. He went on to say perhaps we weren't eligible to join the union because some of our work might be classified as confidential.

He said that certain classes of employees, such as supervisors, office personnel and plant guards are not allowed to join the union, and that we might fall in a similar category.

* * * * *

The Witness: Well, I told Mr. Hathaway that we would take into consideration the things he had said and that the [20] fellows would meet immediately after this meeting and decide what course to take. Then that meeting broke up.

Q. (By Mr. O'Brien): What did the instrument technicians do next?

A. We had a meeting among ourselves and——

Trial Examiner Myers: When?

The Witness: Immediately after the meeting with Mr. Hathaway and decided that we would petition the union to become our collective bargaining agent.

Q. (By Mr. O'Brien): Then what did you do?

A. We went to a Notary Public and drew up this statement.

Q. Referring now to General Counsel's Exhibit No. 2 for identification.

Who is responsible for the language and typewriting on that statement?

A. I am responsible for the language; the Notary Public is responsible for the typing.

(Testimony of Cosby M. Newsom.)

Q. Did the Notary Public type it, is that what you are saying? A. Yes.

Mr. Luce: May I see that, please?

Q. (By Mr. O'Brien): How many copies were made, sir? A. Three.

Q. Is General Counsel's Exhibit No. 2, for identification, the copy which you retained?

A. Yes. [21]

Q. And were all of the signatures made before the Notary Public in your presence? A. Yes.

Q. Did each person sign three copies?

A. Yes.

Mr. O'Brien: I offer General Counsel's Exhibit No. 2 in evidence.

Trial Examiner Myers: Are there any objections to the paper going into evidence?

Mr. Luce: No objections.

Trial Examiner Myers: There being no objection, I will ask the official reporter to kindly mark this document as General Counsel's Exhibit No. 2.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT NO. 2

This is to certify that the undersigned, being a unanious majority of the instrument technicians of the Electrical Production Department of the San Diego Gas and Electric Company, do hereby assign Local 465, International Brotherhood of Electrical Workers, A. F. of L. as the Collective Bargaining

(Testimony of Cosby M. Newsom.)

Agent for the purposes of negotiating wage scale agreement with the San Diego Gas and Electric Company.

/s/ COSBY M. NEWSOM
/s/ OLLIE E. WEBB
/s/ THOS. R. FOWLER
/s/ A. P. BOTWINIS
/s/ ROY A. SHROBLE

Subscribed to before me this 15th day of January, 1951.

[Seal] /s/ E. J. HULTBERG,
Notary Public.

My commission expires 6/11/54.

Q. (By Mr. O'Brien): With regard, again, to General Counsel's Exhibit No. 2, what was done with the first copy of that, sir?

A. It was sent to Mr. Sherwin, head of the Chairman of the Board of the San Diego Gas & Electric Company by registered mail.

Q. Did you mail it? A. Yes.

Q. You say Mr. Sherwin. Is he Chairman of the Board? A. I believe so. [22]

Trial Examiner Myers: What is his official capacity with the company?

Mr. Luce: Mr. Sherwin is vice president in charge of operations.

Trial Examiner Myers: What is his first name?

Mr. Luce: Emory D. Sherwin.

Trial Examiner Myers: Thank you.

(Testimony of Cosby M. Newsom.)

Q. (By Mr. O'Brien): What was done with the second copy?

A. It was delivered into the hands of Mr. Jewett of the I.B.E.W.

Trial Examiner Myers: What do you mean when you say the first copy and the second copy, Mr. O'Brien?

The Witness: I believe this is the original copy here, but one of the two copies.

Trial Examiner Myers: One was sent to Mr. Sherwin and the other was sent to the I.B.E.W.?

The Witness: Yes.

Q. (By Mr. O'Brien): The following day did you have any conversation with Mr. Warden?

A. Yes, we did.

Q. I mean, with regard to the same general subject.

A. Yes, the next morning we had a conversation.

Q. About what time?

A. At 7:30 in the morning.

Q. Who was present? [23]

A. Mr. Warden, Fowler, Shroble and myself.

Mr. Luce: Was that second name Kalins?

The Witness: No. Mr. Warden, Mr. Fowler, Mr. Shroble and myself.

Q. (By Mr. O'Brien): At which station?

A. At Silver Gate.

Q. What was the conversation?

A. Mr. Warden said that our position didn't look too good, and that if he were in our shoes he would get these affairs in order because there is a

(Testimony of Cosby M. Newsom.)

possibility we may all be looking for other work.

Mr. Luce: Wait just a second. Let's get that down.

The Witness: He also asked us if we considered ourselves able to compete in the field as instrument technicians. He said he didn't believe we could.

He said we were going to encounter some strong opposition in our move to organize, and I told him that——

Trial Examiner Myers: Did he say by whom?

The Witness: No, sir, not to my recollection.

Trial Examiner Myers: What did you tell him before I interrupted you? You said "and I told him——"

The Witness: Well, I told him that as far as looking for another job was concerned, my method would be to complete what we had started, meaning our move to organize; that I would carry that through and then look for another job if my [24] position there was untenable. That is about the sum of it.

Q. (By Mr. O'Brien): Then did you go on about your work? A. Yes, we did.

Q. Are you still working for the San Diego Gas & Electric Company? A. No, sir.

Q. And when was the last day that you worked?

A. February 15, 1951.

Q. Did you quit voluntarily or were you discharged? A. I was discharged.

Q. When did you receive your notice of discharge? A. About February 1st.

(Testimony of Cosby M. Newsom.)

Q. How did that notice come to you, sir?

A. I had checked in for work that morning and Mr. Warden told me to keep myself in the clear. He said, "You and I are going down to talk to Kalins."

Trial Examiner Myers: To whom?

The Witness: Mr. Kalins, the efficiency engineer. After an hour or so he said, "Let's go," and we entered his car and drove to Station B.

There was little small talk——

Q. (By Mr. O'Brien): This is in Station B in whose office?

A. In the office of Mr. Kalins.

Q. And who was present besides Mr. Kalins, yourself and Mr. Warden? [25]

A. Nobody. It is the general office, the desks are narrow there.

Q. What was the conversation?

A. Mr. Kalins said, "Believe me, Bucky, I hate to do this, but we are letting you go."

Trial Examiner Myers: You are sometimes known as "Bucky"?

The Witness: Mr. Kalins sometimes calls me that.

Mr. Luce: Will the reporter please read the answer?

(Answer read.)

The Witness: I believe he said to me, "This is nothing personal." He said it was a job he didn't like to do, but he is letting me go. He said, "You

(Testimony of Cosby M. Newsom.)

can apply for a transfer to another department through personnel, you can resign and probably get letters of recommendation, or we will terminate you within two weeks."

I told him I couldn't understand it and what were the reasons for that action? He named off three incidents, spaced throughout my three years of service with the company, and said these were the reasons for my discharge.

I told him that I didn't believe things like that were sufficient and I also told him that in my experience with the department these three incidents didn't loom so large when you take into consideration the frequency of incidents of that nature among the members of the department and the [26] magnitude of some other mistakes that had been made.

I told him also that I would like for him to state the reasons, as he stated them to me, to the rest of the members of the department, and I asked him if it was possible to arrange a meeting with the rest of the members of the department the following day.

He said, "Well, that is a departure from form." He can't see why it would be necessary, because what possible bearing could that have on it. I mentioned that we were in the middle of a move to organize and it certainly did bear on the rest of the members of the department.

Mr. Kalins said he would see if such a meeting could be arranged. While waiting for transportation back to Silver Gate, I was at the door of Sta-

(Testimony of Cosby M. Newsom.)

tion B and waited some 15 or 20 minutes and somehow I was notified that there would be such a meeting and that it would be held right away; that I was to come on up.

We met in a vacant office at Station B and they called Fowler and Shroble up from Silver Gate, and Botwinis and Webb from Station B.

Trial Examiner Myers: Who else was there?

The Witness: Mr. Kalins was there and I believe Mr. Warden went to Station B to pick up the other two fellows there.

For some reason, I believe Shroble was late and we sat talking until we were all there. No one mentioned my discharge [27] at all. Mr. Kalins said they were making big plans for the instrument deparment; that they were going to start a school that would run into about four hours of overtime a week for the fellows, at which time they would be more thoroughly acquainted with their tasks as instrument technicians; that they would be paid for this time.

He also mentioned the possibility that some of the members of the department might possibly be sent back to the Bailey Meter Company to their school and that they were really going to give the department a shot in the arm, and get things humming.

Then Mr. Shroble and Mr. Warden came in and Mr. Kalins stated before the other four men the three incidents.

Trial Examiner Myers: What three incidents?

(Testimony of Cosby M. Newsom.)

The Witness: Well, sir——

Mr. O'Brien: Tell us as well as you can the words used by Mr. Kalins and not your recollection of the incidents, but just what Mr. Kalins said.

The Witness: Well, Mr. Kalins said when he took over the job that Mr. Hardway had, that Mr. Hardway advised he had had words with me a year or so ago and that Mr. Hardway said that the quantity of my work had fallen down somewhat. That was the first incident.

Mr. Kalins said that the second incident was when Warden got after me about some gauges at Silver Gate about [28] a year later, and the third incident was over my method of work as concerns the No. 2 unit at Silver Gate. The crux of it was that there was a number in grease pencil on the face of the gauges. The gauges were installed with dirty faces.

I answered the charges before Mr. Kalins and the rest of the group, and Mr. Warden said——

Q. (By Mr. O'Brien): I hate to interrupt, but did Mr. Kalins just recite these three incidents, one after another, or did he give you an opportunity to answer each one?

A. Yes, between each one.

Q. Will you tell us what answer you gave to Mr. Kalins?

Trial Examiner Myers: In the first place, when did Mr. Kalins take over the department?

The Witness: About the middle of 1950, I believe.

(Testimony of Cosby M. Newsom.)

I told Mr. Kalins, as to the first incident, the discussion between Mr. Hardway and myself, that we had more or less resolved that. It was discovered there was an omission from the daily log. I told him at the time that Mr. Hardway was satisfied. He said it didn't mean much to him, but the log had to pass Mr. Hathaway's scrutiny; that there were two days, in particular, out of several months' work that he didn't particularly think Mr. Hathaway would like. I asked him to show me in the log what two days they were and perhaps I could shed some light on it. I told Mr. Kalins that Mr. Hardway thumbed through the log and showed me the two days [29] and they were the day before and the day after I was sick. I told Mr. Kalins that at that time I had said to Mr. Hardway that perhaps I should have been off all three days. Then it occurred to me that there had been an omission from the log on one of the days that looked like a light day's work.

There had been an item, namely, the overhaul of a piece of Orsat that had been left out and such a thing could easily happen. A person keeps his own account and turns it in to the instrument engineer who writes it up into a smooth log.

I told Mr. Kalins that the first incident between Mr. Hardway and myself was resolved and Mr. Hardway was satisfied; that there were no hard feelings about it, and he said, "Don't tell this to anybody, because we are one big happy family here, the instrument group, we don't squabble among ourselves." He said, "Just forget it, Newt," and

(Testimony of Cosby M. Newsom.)
he shook my hand and left.

The second incident occurred at Silver Gate when I was in charge of the work there under Mr. Warden. I explained to Mr. Kalins that Mr. Warden had called me in and said he had heard some rumors that my work was falling down. I asked him to be more specific. I said, "If it is suffering, I, above all people, should be the first to know, and I should know exactly where I am falling down."

He told me that it was because of some gauges. Mr. [30] Prout, assistant station chief at Silver Gate, had asked me to help him calibrate some gauges.

Mr. Luce: Do I understand the witness is now telling the conversation that occurred at this meeting on February 15th?

The Witness: Yes.

Mr. Luce: When you were telling all of these things to Kalins?

The Witness: Yes, this is when I told Kalins and the group.

Mr. O'Brien: Judge Luce said something about February 15th. Was that the date?

The Witness: No, that was not the date of this meeting. It was February 1st.

I asked Mr. Warden exactly what the complaint was and he said Mr. Prout had complained and said that a week or so ago he had asked me to check the gauges on the No. 2 Unit feed water system and one of them was obviously reading erroneously.

I told Mr. Prout that Mr. Warden calls me by

(Testimony of Cosby M. Newsom.)

phone each morning and outlines my day's work. I said, "I will sandwich the jobs in." There were four gauges, and I said, "I will try to get them among my regular work."

He said, "That would be fine."

I calibrated the gauges about one a day or maybe skipped a day and maybe skipped another one and at the time I was [31] called in there was one remaining gauge. I had my notes in my pocket at that time and it was my intention to get that gauge as soon as I could.

I told Mr. Warden I thought I could see some solution to the situation and that was to clarify and tell me exactly whom I was to take my orders from. If I was to work for Mr. Warden and carry out the things he told me to do, that would be one thing, but if the Station Chiefs were to ask me to do this or that, as a personal favor, naturally, the work that Mr. Warden assigned me, as my immediate supervisor, would have to take preference.

He said, "All right, we can iron that out." And he said further, "From now on, everything comes from me. If someone asks you to do something for them, tell them you will and call me, and I will lay out a plan to get the work done." We left it at that. That was it and things worked out without conflict after that.

The third incident, as I explained to Mr. Kalins, was over the gauges on the No. 2 Unit right after the overhaul. Now, we had been working quite a bit of overtime, and I think one of the points that Mr.

(Testimony of Cosby M. Newsom.)

Kalins brought out at the time I was on the carpet was that I didn't know where the attemperator was on the No. 3 boiler. I told Mr. Kalins that I wanted to know where he got such an idea. He said Mr. Warden told him that I was told the lead the phones to the No. 3 boiler [32] attemperator and that I didn't know what it was. I told Mr. Kalins that I assumed he meant the attemperator drive and I led the phones to the attemperator drive on the No. 3 boiler.

Also, I said that the day was getting long. Mr. Warden and I had put in 18 hours and when you work so long it is very easy to make a minor mistake and he agreed and left it at that point. He said he had not been informed it was in the morning after 18 hours of work. And he said, well, "The main thing was the gauges with dirty faces that were installed on the turbine."

That occurred on a Saturday and that morning when we got our job assignments from Mr. Warden he told us, "We are going to have to shave the overtime as much as possible." He said, "We have got a lot of overtime and they have informed me that we are to shave the overtime." He assigned Shroble and I to install the gauges and the meters on the No. 2 Turbo-unit, and we had been instructed to do it with dispatch. We did that. The complaint was about a small number greased in on the face. We had numbered them clockwise in rotation and the small number in grease pencil was on the face of the gauge. The faces had been cleaned once by Mr.

(Testimony of Cosby M. Newsom.)

Fowler and Mr. Shroble and they had erased the large numbers and replaced them with small numbers in grease pencil that obscured none of the faces. [33]

I told Mr. Kalins that because the turbines were to be painted within a very short period of time there would be more cleaning and because we were told to do the job with dispatch, that we left it at that and let that finish our day's work.

Mr. Warden then said I was the first to leave the building, and I told Mr. Warden that that was not so. That Mr. Cole and Mr. Shroble left the building before I did. In other words, they had completed their work before I had completed mine and that I had put down my time exactly when I left the building.

That was my answer to Mr. Kalins.

Q. (By Mr. O'Brien): What else took place? You have described the charges made against you and the answer you made to the charges on or about February 1st. What else was said at this meeting?

A. Well, I believe it was Fowler who said he was terribly suspicious of this in view of the fact we were organizing and that this would tend to disrupt our move. All of the fellows said they would certainly get behind me in getting to the bottom of this thing. To their minds the charges were unjust. They said that.

I told Mr. Kalins that I was not sure what my recourse would be or whether there would be any recourse, but if there was a single avenue open that

(Testimony of Cosby M. Newsom.)

would tend to straighten [34] the matter out, I would look into it and take action along that line.

He told me he didn't see what I could do. He said, "If I was told by Mr. Hathaway that my work was not up to par," he said, "I would leave immediately and seek another job somewhere else."

I told him I didn't think that idea applied in this case.

* * * * *

Q. (By Mr. O'Brien): Do you remember anything else that was said at this meeting?

A. There was one more incident that was brought up by Mr. Kalins as to the reasons for my termination and that occurred in December of 1950. The situation was that I had been requested to check over, I believe, Unit 1 from top to bottom with special emphasis on draft connections and furnace [35] connections, and to check it over prior to lighting off.

In a subsequent investigation of the panel and working around it, we discovered there was an airflow mechanism that had been pinned down and made inoperative, and this should have been caught. At the time the thing was taken very lightly. There was no possibility that the boiler would have been lit without an indication of airflow in the first place. There was no reprimand. We had a good laugh, Fowler, Shroble and myself. It was Warden who discovered the locked mechanism and we made light of it at the time. That was the very incident that was brought up. [36]

(Testimony of Cosby M. Newsom.)

* * * * *

Q. (By Mr. O'Brien): Do you know whether, in response to my question, it is now your recollection at this meeting on February 1st that Mr. Kalins mentioned the incident which you have just described? A. Yes.

Q. Did he mention it in approximately the words you used? A. Yes.

Q. And did you reply to him?

A. Yes, I did.

Q. In approximately what words?

A. I just stated my reply.

* * * * *

Trial Examiner Myers: I think you better tell us again. [37]

The Witness: Mr. Kalins mentioned, as a third incident, the fact that I had been instructed to check over Unit 1, the two boilers, with emphasis on the draft line connections and all controls in general. He mentioned that I had overlooked or failed to find a locked mechanism that was rendered inoperative through someone's carelessness that I should have caught.

My reply to Mr. Kalins was that I should have caught it, but that I failed to see why this should be part of the reason for my dismissal when at the time nothing was made of the incident. Mr. Warden was the fellow that discovered it and no one would have lit the boiler off without an indication of air flow. There was no indication of a mistake that would damage any property. I admitted that I

(Testimony of Cosby M. Newsom.)

should have found it, but I couldn't see any great degree of guilt or why something wasn't mentioned at the time.

Trial Examiner Myers: When did this incident take place?

The Witness: Sometime in December, I believe.

Trial Examiner Myers: 1950?

The Witness: 1950, sir.

Q. (By Mr. O'Brien): Is that all you recall of this meeting on or about February 1st?

A. Yes.

Q. Did you continue to work for the following two weeks? A. Yes, I did. [38]

Q. During the following two weeks did you have any further conversations with any of the supervisors whom you have named?

A. From day to day different supervisors spoke to me.

Q. If you will, give the date, approximately, the time, place and who was present.

A. I believe at the first conversation when I was told I was to be terminated, when Mr. Warden, Mr. Kalins and myself were present, Mr. Kalins told me if I was off sick within the next two weeks I must bring a doctor's certificate. Then, later, when I reported to work at Silver Gate, the next day Mr. Warden assigned me to calibrating test gauges and I was told by Mr. Warden not to circulate among the men of the plant; that I was to stay right at my work.

I was also told by Mr. Warden the next day that

(Testimony of Cosby M. Newsom.)

the company didn't have to give me two weeks; that they could let me go immediately and they would do so if it looked like I was going to circulate among the men and tell them about all of this.

Trial Examiner Myers: Were you ever required to bring a doctor's certificate on one day's illness?

The Witness: No, sir.

Q. (By Mr. O'Brien): During the two weeks, did you have any further conversations with Mr. Kalins? A. Yes, I did.

Q. Approximately when? [39]

A. It was within a day or so of my termination. He came to me and told me he couldn't see why I didn't resign because that would make things much easier; that there was some strong possibility I might be able to collect my vacation pay if I did resign, and he couldn't see why I didn't do that.

He also told me I was a good man and that within a few years I probably would be driving up out front in a Cadillac because of my ability, and so forth.

I outlined to him what I had learned of the recourse I had through the National Labor Relations Board and that I was pushing the case; that I was petitioning the National Labor Relations Board for a hearing on the matter and he said he couldn't understand why I felt like that, why there was so much at stake. I explained to him I felt quite strongly about our move to organize and that I was willing to make any sacrifice.

(Testimony of Cosby M. Newsom.)

Q. Did you have any conversation with Mr. Hathaway during the two-week period?

A. No, I didn't see Mr. Hathaway.

Q. Did you have a conversation with either of the station chiefs during the two-week period?

A. Yes.

Q. With whom?

A. Mr. Campbell, the station chief at Station B.

Q. Where were you working at the time? [40]

A. I was working at Silver Gate.

Q. And who was present?

A. Mr. Campbell and myself.

Q. Can you tell me approximately when it was within the two-week period?

A. I believe it was in the first week, it was soon after I had been given my termination.

Q. What was the conversation?

A. Mr. Campbell seemed quite concerned. He had recommended me quite highly a year or so prior and he seemed quite concerned that I was broken hearted over this. He wanted me to face the world with a stiff upper lip and get started in some other field. He said I was strong and versatile, able, and no doubt make my mark in whatever field I chose. He said I should get started on it right away.

He also told me that at one time he had been in a situation quite similar to my own. He said that he was employed as a young man, married and with one child, and a similar circumstance arose. He thought he was doing very well in a power plant somewhere in the west and he went along for sev-

(Testimony of Cosby M. Newsom.)

eral years and worked himself up, when all of a sudden one day he was called in by an unjust employer and told that he was going to let him go.

Mr. Campbell told me he let the fellow have it. I told him that I wouldn't think of doing anything that childish in [41] this situation; that I bore no malice toward anyone, in particular, and I had the feeling this was not the work of any single individual opposed to me in the organization; that I wouldn't do a thing like that.

He went on to say that even after he left the station chief have it, three years later it was necessary for him to account for the time he had put in at this power plant and he wrote the station chief for a letter of recommendation and he got the letter. The letter said simply that Mr. Campbell had left their employ during the time of labor curtailment. In other words, there was no blot on his record.

He said he also failed to see what I stood to gain by pushing this through the court. He said, "Let's suppose these charges against you are false." I said, "I know the charges are quite real, they have a foundation in fact."

He said, "Well, let's suppose," and I went along, and he said, "Supposing that these charges are entirely false against you, these people who have charged you and done you wrong will suffer for it in the hereafter."

The conversation lasted about four hours, we talked of many general things, and closed it on that.

(Testimony of Cosby M. Newsom.)

Q. During approximately what period did you work under Mr. Hardway's supervision?

A. I believe Mr. Hardway became efficiency engineer about five or six months after I entered the instrument department. I would say two years I was under Mr. Hardway. [42]

Q. Mr. Hardway went into the service approximately when?

A. I imagine around August of last year.

Q. Was he succeeded immediately by Mr. Kalins? A. Yes.

Q. Of the five instrument technicians who have signed General Counsel's Exhibit No. 2, which ones served under Mr. Hardway for about how long?

A. Mr. Webb.

Q. For about how long?

A. I would say a year, possibly.

Trial Examiner Myers: You mean approximately a year? The Witness: Yes.

And Shroble, a matter of weeks.

Q. (By Mr. O'Brien): Yourself, of course?

A. Yes.

Q. Did Mr. Fowler ever serve under Mr. Hardway? A. No, sir.

Q. Mr. Botwinis? A. No, sir.

Q. Mr. Shroble?

A. Shroble, a few weeks.

Q. After Mr. Hardway went into the Navy, did he visit the plant? A. Yes, he came back.

Q. Approximately when?

A. I believe it was around Christmas of 1950.

(Testimony of Cosby M. Newsom.)

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Where was that?

A. I was working on the No. 2 Unit at Silver Gate and Mr. Hardway came in with some relative. He introduced me to the relative at that time and we had conversation.

Q. What was your conversation with Mr. Hardway?

A. Well, he mentioned that they had cut his liquor rations down up at Mare Island, and just general conversation. He also asked me how I was doing and I told him that we were really rushed. We just spoke lightly for a while and he said, "It looks like this war may involve us too, and if you and the rest of us all return," he told me, "remember this, Newt, there is a place for you in the instrument department." He said, "I don't care whether you go back in the Merchant Marine, the Navy, or what, but there is a place for you in the instrument department."

* * * * *

Cross Examination

Q. (By Mr. Luce): When you left the employ of the company, did you obtain other employment?

A. Yes.

Q. Where?

A. I worked for the California Glass Company.

Q. And how soon after leaving the San Diego Gas & Electric Company did you obtain that employment? A. About two months.

(Testimony of Cosby M. Newsom.)

Q. After about two months? A. Yes.

Q. Are you still employed by them? [45]

* * * * *

Q. (By Mr. Luce): Mr. Newsom, from time to time during your employment with the company as an instrument technician, you were told that your work was not satisfactory, were you not?

* * * * *

The Witness: Three times in three years.

Q. (By Mr. Luce): When was the first time?

A. Soon after Mr. Hardway took over as the efficiency engineer.

Q. That was about what date, if you remember?

A. I would say possibly June of 1949.

Q. And was it Mr. Hardway that told you your work was not satisfactory? A. Yes.

Q. What did he say?

A. He said that he had no complaint as to the quality of my work, but the quantity was falling down.

Q. Did you say quality or quantity?

A. The quality of my work was fine, but the quantity seemed to be falling down. [47]

Q. What else did he say?

A. I said, "The record of the work performed is kept in the log." He had a copy in his hand and I said I would appreciate it if he would show me in the record where the quantity of my work had suffered because I felt, as a man, I had been doing a day's work each day.

He had his thumb in the book and he said, "Well,

(Testimony of Cosby M. Newsom.)

Newt, I want you to understand it is not me, but this smooth log must pass through Mr. Hathaway's scrutiny and something like this might stir him up."

He pointed to two days' work in particular, which were in the smooth log and he said, "These are the two days I am most concerned with." As I stated previously, one of the days was a day prior to a day when I was off sick and the other was a day after a day I was off sick.

Q. As a matter of fact, you were only off sick in that instance just one day?

A. Yes, the two days in complaint were on either side of that day.

Q. Did he say to you that you should improve your work and bring it up to a higher standard?

A. He asked me to look at the two days, in particular, and I read them. I said, "It seems to me like they are a couple of pretty soft days," and my first reaction was that I must have been quite sick and should have been off all three days. I told him that and suddenly it occurred to me there had been an omission from the log. I explained that to him, and he said, "Well, that takes care of that day."

Then we went to the next day, the other day, and he said, "What about this?" I explained that I had to fabricate for the job. In other words, I believe I installed a gas bowl and capillary tube and I had to fabricate a well. In other words, make the mechanism and that took time. I explained that

(Testimony of Cosby M. Newsom.)

to him and he said, "Well, perhaps you put more time in that project than it was really worth." I agreed with him that perhaps I did.

Q. Were they the only things he mentioned?

A. These were the only things he mentioned.

Q. When was your work next criticized by some supervisor?

A. It was shortly after I had taken over the work at Silver Gate and was broken in to there by Mr. Warden, when he moved up instrument engineer.

Q. About what was the date?

A. I would say eight or nine months later.

Q. What did Mr. Warden say to you?

A. As I said, he said that he had heard some complaints as to my work, that it seems that it had fallen down. He said he has heard a vague rumor and I said, "If we could get more concrete information I may be able to do something about it." He finally said, "It is about those gauges on the No. 2 feed water system that Mr. Prout asked you to calibrate." And I immediately said, "Oh, those," and went on to explain why it was I hadn't completed the job.

It was, as I told Mr. Warden, due to the fact he was giving me work assignments each day. I had a notebook full of work. The work was outlined a week ahead or so; and this other command came from Mr. Prout. I was doing my best to sandwich the work requested by Mr. Prout in with the work given to me by Mr. Warden.

(Testimony of Cosby M. Newsom.)

I further explained to Mr. Warden that a situation like that might not arise if it was cut and dried as to who gives me the work assignments. He agreed and he said, "In the future when you are asked by someone to do something, get in touch with me—use the phone—I am down at Station B, and if you call me up I can fit it into the program and see that there is time allowed for it and we will avoid situations like that." We left that conversation right there.

Q. When was the third time your work was criticized and by whom?

A. Well, it was when Mr. Kalins came down. It was after he had assumed the duties of efficiency engineer, and Mr. Warden called me in the office.

Q. What time was that about?

A. I believe it was in the early afternoon.

Q. Of what day?

A. I don't recall exactly. [50]

Q. Can you give us the month or the year?

A. It was within a few months after Mr. Kalins took over as efficiency engineer.

Q. When did he take over as efficiency engineer?

A. I don't know exactly.

Trial Examiner Myers: Approximately?

The Witness: About June or July, I imagine, in 1950.

Q. (By Mr. Luce): State what Mr. Kalins said.

A. He said that he had some complaints about my work. He said that we were producing fine, doing plenty of work, but that I was falling down

(Testimony of Cosby M. Newsom.)

on little things. He mentioned a few, such as, installing the gauges on the No. 2 turbo-generator and leaving the faces dirty. I told him that the faces were not obscured; that I used to be an operator myself and it was natural for me to clean things up like that, but that I couldn't see it at $6.00 an hour how we would be justified in staying on on Saturday. And Mr. Shroble and I were both assigned to the job in doing the work.

He mentioned some things as to my attitude, it wasn't what he expected when he came up there to tell me these things, and Mr. Kalins told me that Roy said to Mr. Kalins that I didn't know where the No. 3 attemperator was. I asked him where would he get an idea like that and Mr. Kalins said, "That is what Roy said."

I told Mr. Kalins that that incident, to my recollection, occurred when I was told to leave the 'phones down there, and working with Mr. Warden after about 18 hours of continuous work. Immediately, Mr. Kalins said, "Oh, that happened after 18 hours of work?" I said, "Just about." He said to leave it at the attemperator to the south and I thought he meant the attemperator at Drive A.

Mr. Warden said that I thought so little of the job that I was the first man out on Saturday. I told him that was not so, that Mr. Cole and Mr. Shroble both left the plant before I did and I put down my time exactly when I left. Mr. Warden didn't say anything to that. Mr. Kalins said, "Well, what are we going to do?" He said, "How are we

(Testimony of Cosby M. Newsom.)

going to resolve this?" Mr. Warden said, "Well, let's watch things pretty close for the next 30 days and see how things are." As a matter of fact, I marked the calendar and watched it closely for the 30 days and at the end of the 30, 40 or 50 days there was no reason for me to believe that I wasn't doing fine.

Q. Of course, I only asked about the criticisms made of your work.

Mr. Luce: May I ask another question before we adjourn?

Trial Examiner Myers: Yes, certainly.

Q. (By Mr. Luce): Did you ever work 18 hours in any day for the company? A. Yes.

Q. Do you remember what day it was? [52]

A. Well, it was very close to 18 hours, at least 16.

Q. Was it 16 or 18?

A. Quite a length of time, at any rate.

Q. Was it the 16 or more?

A. I do not recall.

Q. And you don't know whether it was 18 or not? A. It could have been.

Q. Isn't your statement incorrect that you at any time worked 18 hours in any one 24 hour period for the San Diego Gas & Electric Company?

A. I would say that I have worked 18 hours from the time I started until the time I quit, meal time and things like that considered as straight time.

(Testimony of Cosby M. Newsom.)

Q. You mean when you went out for your meals?

Trial Examiner Myers: You mean including the time you took for meals?

The Witness: Yes, an 18 hour stretch without sleep.

Q. (By Mr. Luce): How many times did you work 18 hours including the time you took off for meals? A. I don't know, at least once.

Q. At least once? You don't remember of any other instance?

A. I remember working other long stretches of time.

Q. You haven't any records of your own?

A. No, sir. [53]

* * * * *

Q. (By Mr. Luce): Mr. Newsom, was your work ever criticized by Mr. Zitlaw, the station chief at Silver Gate? A. No, sir.

Q. Was your work ever criticized by Mr. Campbell, the station chief at Station B?

A. Not to me.

Q. Was it ever criticized by Mr. Stovall?

A. No, sir.

* * * * *

Q. (By Mr. Luce): Now, Mr. Newsom, when you talked with Mr. Warden on January 15, or January 16, one of these times, did he not say that he would assist you in making your application to the union for admission to the union?

A. Not in so many words.

Q. Well, now, what did he say in reference to assisting you?

(Testimony of Cosby M. Newsom.)

A. He said that he would help us compile the information as to our duties as instrument technicians so that we might compare them with the duties of the instrument repairmen throughout southern California in an effort to clear up the differential in pay.

Q. Also, in order to give you the proper classifications for your positions in the union, did he not?

A. I don't believe he mentioned the union.

Q. Wasn't that the purpose of getting the job classifications of the instrument technicians, so that you could use it in your application to the union to be your bargaining agent?

A. We didn't include anything of that nature in our application to the union.

Q. Didn't Mr. Warden say you should include it and that he would give you the information to include it?

A. No, sir, I don't believe he did.

Q. He did furnish you with that information as to the proper classifications and duties of your jobs?

A. Some time later he procured from personnel our job classification sheet and the list of duties required of the instrument men by the San Diego Gas & Electric Company. [55]

* * * * *

Q. I now hand you a document headed "Copy" and at the top in pencil is a notation, "Given to the Instrument Technicians." I will ask you if that

(Testimony of Cosby M. Newsom.)

is the sheet that Mr. Warden gave you during the week following January 15, 1951?

A. That looks like it, yes.

Mr. Luce: We offer this document.

Trial Examiner Myers: Is there any objection, Mr. O'Brien?

Mr. O'Brien: No objection.

Trial Examiner Myers: There being no objection to the introduction of this document in evidence, I will ask the reporter to kindly mark it Respondent's Exhibit No. 1.

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 1 and was received in evidence.)

RESPONDENT'S EXHIBIT No. 1

(Copy)

Job Title: Instrument Technician; Grade: B; Classification: 10. Code No. W-521-A. Supersedes W-521.

Job Summary: Under direct supervision: Operates, adjusts, maintains and repairs test instruments and control equipment utilized to assure optimum plant efficiency; conducts varied electronic, chemical and mechanical tests; assembles routine and special operating data; performs other related duties as required or directed.

Work performed: Under direct supervision: Reviews operating logs and trouble reports for entries concerning instruments and control equipment;

(Testimony of Cosby M. Newsom.)

takes necessary corrective action on mis-operations; reviews recording charts and strip records for required adjustments or repairs.

Consults with the Instrument Engineer to compile the daily work schedule in accordance with the routine job control book and special work indicated by operating logs or as requested by the Station Chief or Efficiency Engineer; completes operational checks and daily maintenance on electronic and mechanical combustion control systems, temperature indicators and recorders, pressure gauges, etc.; assists in planning, scheduling and performing the annual overhaul of controls and instruments.

Periodically collects data on boilers to indicate cleanliness; checks vibration on large turning equipment; assists with other mechanical, chemical and electronic tests. Maintains records of routine tests; performs other related duties as required or directed.

Q. (By Mr. Luce): In regard to this transfer of your work to the general overhaul and back to some other work, when were your duties changed so that you were put to work on that general instrument over haul?

A. Well, whenever the over haul period started. It was the rule to sacrifice, to pull a man off of the routine and put them on the over haul. [56]

Q. Well, let me refresh your memory. Along in September of 1950 the big generator went out at the Silver Gate Power Station, did it not?

(Testimony of Cosby M. Newsom.)

A. I believe that is correct.

Q. There was a great deal of activity and a lot of work done by various persons in the employ of the company in regard to restoring that generator, is that correct? A. Yes.

Q. I think you ought to speak out because the reporter can't see you nod your head.

A. Yes, that is right.

Q. Then that same time the instrument men were put to work making a general over haul of the instruments while the generator was out, is that correct? A. That is correct.

Q. During that period everybody was very busy because of the generator having gone out?

A. Yes.

Q. Now, how long were you engaged in the over haul of the instruments at that time, beginning in about September, 1950?

A. I couldn't say exactly, each day's work was assigned.

Q. Let me ask you who assigned it.

A. Mr. Warden. [57]

Q. For each day? A. For each day.

Q. Go ahead.

A. There was a long range work sheet that he had which gave us the general idea. The work assigning was done exclusively by Mr. Warden, he didn't have any one else to help him.

Q. Let me put it this way. How long did that continue, the over haul of the instruments by you and whoever worked with you?

(Testimony of Cosby M. Newsom.)

A. I don't know.

Trial Examiner Myers: Approximately?

The Witness: Well, it seems several months. We were doing other work in conjunction with it. We had work at Station B, and so forth, that wasn't strictly all we did. [58]

* * * * *

Q. Who worked with you on the general over haul program?

A. Primarily, Mr. Fowler, Mr. Shroble, and Mr. Warden.

Q. That is, the three of you, Mr. Shroble, Mr. Fowler and yourself worked under Mr. Warden on that program? A. Yes.

Q. When that was completed was when Mr. Warden transferred you back into some other duties, was it not?

A. That was no longer in process. The job was completed and we were to resume normal operations.

Q. And do you remember about when that was? You say it was a few months. Can you give us a more accurate period of time?

A. It was around the first of the year, 1951, that he spoke of resuming the routine. [59]

* * * * *

Q. Let me ask you right there—the work, generally, that you and other instrument technicians had to do was inspecting and regulating various instruments throughout the production plant?

A. Yes.

(Testimony of Cosby M. Newsom.)

Q. And that responsibility was upon you to have those instruments in good working order so that they would accurately disclose what they were supposed to disclose? A. Yes. [60]

Q. And if the instrument technicians failed in their work in any respect, it might cause a good deal of harm or damage to the plant?

A. Yes.

Q. And it was highly important that the technician men be not only highly trained, but be cooperative and on the job as well as accurate in their work? A. Yes.

Q. You recognize that as one of the requirements of your job? A. I do, sir.

Q. As a matter of fact, a mistake of the instrument men might put a whole plant out of operation and cause not only damage to the company, but interfere with the production of electricity for the whole city? A. It certainly could.

Q. Now, when you had the conversation with Mr. Hathaway on January 1st, that is when the three of you went up there, maybe it was four or five of you, Webb, Newsom, Fowler, Shroble and Botwinis, with Kalins, and, I believe, Warden?

A. That is correct.

Q. At that time Mr. Hathaway explained to you the advantages and disadvantages of joining the union, did he not?

A. He didn't explain any advantages.

Q. Well, he told you that there might be advantages in it to you, did he not? A. No, sir.

(Testimony of Cosby M. Newsom.)

Q. All he did was to explain the disadvantages?

A. Yes.

Q. He said to you at that time that if you joined the union you would have to abide by the union rules and contract which might require you to work certain hours in a different way than you did at the present time?

A. He said if we joined the union the contract would be lived up to hard and fast.

Q. That is, the union contract?

A. The union contract.

Q. And there might be disadvantages to you in having to comply with that contract over your present occupation, is that not correct?

A. He assured us there would be.

Q. He also suggested that you might not be eligible to join the union because of the particular field of the instrument technicians which, he said, was confidential work? A. Yes.

Q. Did he tell you that the question of whether or not you would be eligible would come up in the negotiations brought to the company by the union?

A. No, sir.

Q. When you left Mr. Hathaway's office he said nothing in the way of a threat of discharge or reprisal or anything of that kind, or of anything that you would lose your job if you joined the union, or anything of that nature, is that not correct?

A. Well, he didn't make any threats.

Q. And when you left after listening to him

(Testimony of Cosby M. Newsom.)

you said you and the other men would meet later and decide what to do? A. Yes.

Q. Now, Mr. Newsom, no one of you five had been selected as spokesman up to that time, had you?

A. We didn't have a vote or nominate. It was assumed that I was the spokesman.

Q. Fowler talked as much as you did at all these meetings?

A. Mr. Hathaway said, "Who is your spokesman?" I spoke—I didn't jump to speak, but I looked around me and no one said a word for, I would imagine, a full ten seconds and I just began speaking. I was, you might say, there unofficial leader and spokesman.

Trial Examiner Myers: You appointed yourself as spokesman?

The Witness: No, sir, I didn't.

Trial Examiner Myers: You carried the ball for the employees? The Witness: Yes.

Q. (By Mr. Luce): Didn't Mr. Fowler do some talking, also? A. We all did some talking.

Q. Didn't Mr. Fowler do about as much as you did, at the various meetings? [63]

A. Mr. Fowler knew quite a bit about it. We had discussed every phase of it. All of us, we all carried the ball. We are still carrying the ball.

Q. Didn't Fowler do as much talking and carry the ball in these matters as much as you did?

A. It is hard for me to say.

Q. There wasn't much difference between the

(Testimony of Cosby M. Newsom.)

activity of the two of you at these meetings, was there?

A. We were in agreement at these meetings.

Q. I mean in your activity and what you said at these meetings?

A. I assumed that I was the leader. It is hard for me to say.

Q. Now, you had conversation with Mr. Warden the next morning on the 16th, about 7:30 a.m.?

A. Yes.

Q. Now, will you tell me just what Mr. Warden said to you at that time?

A. Well, he said that our position didn't look very strong; that he had been talking with Mr. Hathaway and other people and it certainly looked bad for us. He said, further, that if he was in our shoes he would be looking around for other employment.

Q. That was all that he said at that time in regard to your activities?

A. No, sir, he asked us if we thought we could compete in the market as instrument engineers. He said he thought there was no scarcity of instrument engineers, technicians and the like, and that their field of experience in the business was much wider than ours.

Q. It was after that conversation at that meeting that Mr. Warden furnished you with the description of the job classifications which has been introduced into evidence as Respondent's Exhibit 1?

(Testimony of Cosby M. Newsom.)

A. It was after that, yes. We requested it of him later and we also drew up our own list of things that we are required to do among ourselves.

Q. Didn't Mr. Warden say at that conversation that if you were going to make the application you better get your facts straight and have it in good shape, and that he would furnish you with the proper descriptions of your job classifications?

A. His attitude at that meeting was that he wanted nothing to do with the union organization.

Mr. Luce: I ask that that be stricken out as his conclusion.

Trial Examiner Myers: Strike it out.

Q. (By Mr. Luce): What did he say?

A. I don't remember discussing it at that time, this job control sheet.

Trial Examiner Myers: Job descriptions?

The Witness: Job descriptions. [65]

Trial Examiner Myers: What do you mean, you don't remember?

The Witness: We did not discuss it at that time; that it was not discussed.

Trial Examiner Myers: I think this would be a good time to adjourn for lunch unless there are some objections.

Mr. O'Brien: No objection.

Mr. Luce: No objection.

Trial Examiner Myers: Very well, we will stand adjourned until 2:00 o'clock. The witness is excused until 2:00 o'clock this afternoon.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [66]

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 2:00 o'clock p.m.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. OBrien: General Counsel is ready.

Mr. Luce: We are ready.

Trial Examiner Myers: Mr. Newsom, will you resume the stand?

COSBY M. NEWSOM

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Luce): At that meeting in September, I believe it was when the discussion of the dirty gauges occurred, do you recall that?

A. Yes, I do.

Q. Now, at that time, isn't it a fact that you were told at that meeting that if your work did not improve and if it was again found unsatisfactory that you would not be allowed to continue in the instrument technician division?

A. No, sir, I was not told that.

Q. Now, at this meeting of February 1st with Mr. Kalins you stated at that conversation that

(Testimony of Cosby M. Newsom.)

there were three reasons, or gave three reasons, why you were discharged or terminated. [67]

Did he say there were three incidents?

A. He said there were three incidents?

Q. Didn't he tell you of more than three incidents?

A. Well, he used several adjectives and he told me that these were incidents that pointed out that I was incompetent and haphazard, and various other things. He said these incidents pointed that out to him and he was letting me go on account of that.

Q. When you testified this morning you stated in this conversation he gave you three reasons and you recited the reasons. Then you said there was another reason which you proceeded to tell us about. Does that make four reasons, or is that one of the three reasons?

A. There were three given more emphasis than the others.

Q. Then there were three given and then there was another one, is that right?

A. I don't believe Mr. Kalins mentioned it. I am not sure, maybe I divided one of the reasons. There were three reasons given, three incidents cited as to why he was letting me go.

Q. Weren't there more reasons?

A. Three major incidents.

Q. Weren't there minor incidents given?

A. I imagine a few, I don't recall anything but the three main incidents.

Q. Why did you say those were the major

(Testimony of Cosby M. Newsom.)

reasons? Did Mr. Kalins call them the major reasons? [68]

A. He laid a lot of emphasis on them.

Q. Did Mr. Kalins have in his hand some notes that he was using, either reading from or used to refresh his memory at the time he was telling you the reasons for your discharge?

A. He had some papers.

Q. Didn't he give you five general reasons why you were being discharged?

A. He could have.

Q. At that time you say that Mr. Warden was present, too, was he not? A. Yes, he was.

Q. One or the other, or both of them, told you that you were free to apply for a transfer to another department?

A. Yes, I believe Mr. Kalins said that.

Q. And didn't you get angry and say you didn't want any transfer?

A. I said that according to what he had just said. My thoughts at the time were this: If, as he said, I wasn't any good in the instrument department, I wouldn't be any good in any other department.

Q. I am not interested in what your thoughts were, but what was said.

A. I said that a transfer to another department would defeat our efforts to organize as completely as my resignation. That is what I was interested in, primarily, organizing the department. [69]

(Testimony of Cosby M. Newsom.)

Q. You weren't particularly interested in retaining your job?

A. In retaining employment, yes.

Q. You weren't interested in your job?

A. I was interested in the job, I liked the job.

Q. Were you interested in retaining your job as a technician? A. I certainly was; I am.

Q. What you mean to say is that your primary interest was in organizing the department?

A. Well, I had to choose between a transfer to another department, termination or resignation.

Q. And you chose termination? Is that right?

A. I made no choice at all. They terminated me. I refused to choose.

Q. And you refused to make a transfer to another department? A. Yes.

Q. Now, at this meeting you requested Mr. Kalins to call the other members of the department together and discuss again this question of discharge, did you not? A. Yes.

Q. And he did call them? A. Yes.

Q. And at that meeting he went over again the reasons for discharge? [70] A. Yes.

Q. And was it at that meeting when he told you that he didn't see what you had to gain by making your application for proceeding with some redress before somebody?

A. At that meeting he said he didn't know what I could do to seek redress. Later, in an interview between Mr. Kalins and myself, he said he didn't see what I had to gain.

(Testimony of Cosby M. Newsom.)

Q. Did you not say at that time, in the presence of Kalins and Warden, that you were going to pursue the matter if only for the nuisance value?

A. Possibly, I said something like that. To my mind, I was going to pursue the thing to the limit because I hate to see anything half done. In my mind it is necessary to conclude each phase of living and I told him, I made no bones about the fact, that I was going to do everything in my power to bring about a redress.

Q. Did you not use that expression, "If only for its nuisance value"?

A. I possibly did.

Q. By the way, you stated in your direct examination that you were, at least at one time, a member of this union, the I.B.E.W. And were you a member at the time you were an instrument technician?

Mr. O'Brien: I will have to object. It is immaterial as far as the issues of this case go. [71]

Trial Examiner Myers: Overruled.

The Witness: I was in the union up to the time I entered the instrument department.

Q. (By Mr. Luce): Then, up until the time you entered the instrument department, you were a union member? A. Yes.

Q. Then, you didn't keep up your membership after that? A. That is right.

Q. And you are not a member now?

A. No, sir.

(Testimony of Cosby M. Newsom.)

Q. You dropped your membership about the time you became an instrument technician?

A. That is right.

Q. There was nobody required that you drop that or suggest that you drop it?

A. I was told that it was a useless undertaking. I was told that instrument men are not covered by the union contract.

Some time later Mr. Hathaway called me and said that Mr. Jewett had called about me and said I was behind in my dues. I told Mr. Hathaway that that was so and since entering the new department I was no longer represented by the union; that I had ceased to pay dues since that date. He said, "That is all right, Newt, I have to see Mr. Jewett this afternoon and I will straighten it out." [72]

Trial Examiner Myers: Who is Mr. Jewett?

The Witness: At that time, he was business agent of the I.B.E.W.

Q. (By Mr. Luce): Mr. Newsom, there was one time when you were absent from your job for approximately three days without giving any explanation therefor, was there not?

A. When you return to work after an absence, it is the common practice to state why you were absent. I probably stated why.

Q. You probably did, but did you?

A. It would be an oversight if I didn't.

Q. Wasn't that suggested to you at one time as one of the breaks in the rules of employment

(Testimony of Cosby M. Newsom.)

and one of the reasons why your work was criticized?

A. No, nothing in that nature was ever mentioned to me.

Q. Nobody ever mentioned to you the fact that you were absent without explanation?

A. No, sir.

Trial Examiner Myers: Were you absent for three days?

The Witness: Maybe, I think I averaged about twelve days sick leave in a year.

Trial Examiner Myers: When?

The Witness: It could have been any time during the three years. I don't remember any particular three day period.

Q. (By Mr. Luce): Whatever your vacation rights were, it would be expected of you to notify the company if you were going to be absent for three days? [73]

A. There was one incident where I called in and told the man on the watch, I used the unlisted phone number, that I was ill and wouldn't be there that morning. I had strep throat and a doctor treated me. Somehow or other the news evidently was relayed to Mr. Warden. I remember that one incident.

Q. You were absent for three days?

A. I am not sure.

Trial Examiner Myers: Do you remember when that incident was?

The Witness: Near the end of September 1950.

(Testimony of Cosby M. Newsom.)

Q. (By Mr. Luce): There was also an occasion on which you signed somebody else's name to one of the logs or inspection sheets?

A. Nothing was ever mentioned to me.

Q. Was it mentioned to you? A. No.

Q. You tried to erase the name and Mr. Warden was there and protested about your action?

A. I recollect such an incident. It seems that on my rough notes, I believe that was in connection with Shroble. He and I were taking alarm settings. I wrote down Webb's name, just to be frivolous. That was not to go to the smooth sheet, and Webb knew nothing about taking the alarm settings. I forgot the situation, but it was so humorous no one ever mentioned it to me up to this time.

Trial Examiner Myers: When was that?

The Witness: Toward the end of 1950, December or so.

Q. (By Mr. Luce): Have you described to us your conversation with Mr. Kalins and Mr. Warden at the time they notified you that you were about to be discharged? A. Yes.

Q. Did you not have an angry altercation with Warden, and did you not use abusive language?

A. No, sir, I did not. That is not my nature.

Q. You didn't get angry or raise your voice?

A. No, sir.

Q. Or become insulting?

A. No, sir, at no time.

Q. When you met a little later with Warden and Kalins, and the other technicians were present,

(Testimony of Cosby M. Newsom.)

did you not at that time criticize Warden severely and use angry and loud language?

A. No, sir.

Q. You didn't get angry and use angry words towards him? A. No, sir.

Q. Your answer is no? A. No.

Q. Your answer is no?

A. That is right, no.

Q. Do you mean to say that you and Campbell sat for four hours in this conversation you related where you told about an incident when he was discharged once?

A. Maybe three and one-half hours. I know I had been working a while and we talked until noon.

Q. Three and one-half hours without interruption? A. Right.

Q. Where did that take place?

A. It took place in an unused office at Silver Gate.

Q. Just you and Mr. Campbell were present?

A. Yes.

Q. Was the door closed? A. Yes.

Q. And you two sat in that room for at least three and one-half hours?

A. Approximately.

Q. You must have talked about a lot of other things? A. Yes, we did.

Q. I don't want you to tell what you talked about, but what was the nature of the conversation, other than you related here?

A. I went over the three incidents with him

(Testimony of Cosby M. Newsom.)

that had been cited by Mr. Kalins and he seemed sympathetic towards me. We discussed the fundamental philosophies—it was high level conversation. It is a little difficult to recall just what was said, other than I have stated.

Q. Well, you will say there was a lot more in the conversation than what you have related here?

A. I have recited everything in the conversation that had any bearing with the case.

Q. That is, what you think has any bearing?

A. That is the best I can do, think. [77]

* * * * *

ROY SHROBLE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. O'Brien): Where do you work, Mr. Shroble?

A. San Deigo Gas & Electric Company. [78]

Q. What is your job?

A. Instrument technician, grade B.

Q. Who is your immediate supervisor, please?

A. Mr. Warden.

Q. When did you become an instrument technician B? A. I believe, July 24, 1950.

Q. Was that under Mr. Warden? A. Yes.

(Testimony of Roy Shroble.)

Q. And who was over Mr. Warden on July 24, 1950? A. Mr. Hardway.

* * * * *

Q. How long did you work for the company, altogether? A. Since April 12, 1950.

Q. I show you General Counsel's Exhibit No. 2; do you remember signing that document?

A. Yes, I do.

Q. On the date which it bears there, January 15, 1951?

A. Yes, I believe that is the date.

Q. Do you recall any conversation with Mr. Warden on the same date that you signed that statement? A. Yes.

* * * * *

Q. Calling your attention to the morning of July 15, where did this conversation take place?

A. July 15th?

Q. I beg your pardon, January 15th.

A. In the instrument engineer's office at Silver Gate.

Q. Who was present?

A. Mr. Newsom, Fowler, myself and Mr. Warden.

Q. What was the conversation about?

A. Well, we notified Mr. Warden that we were going to make the IEBW, Local 465, our bargaining agent because we wanted to join the union.

He was very nice about it at the time. He said he would help us all he could, and well, it was on that general order. He said he would help us as

(Testimony of Roy Shroble.)

much as he could and I believe we asked him for a list of our duties at that time, if I remember correctly, and he said he would help us in every way he possibly could.

Q. Later that afternoon did Mr. Warden approach you again? A. Yes, he did.

Q. Where were you at the time?

A. At Silver Gate.

Q. What did he say?

A. He said he had arranged a meeting with Mr. Hathaway at Station B and would I come down with the rest of the fellows.

Q. Did you then go to Station B?

A. Yes, I believe so. [80]

Q. Where did you go?

A. To Mr. Hathaway's office.

Q. Who was present?

A. Mr. Newsom, Mr. Webb, Tony Botwinis, Thomas Fowler, Mr. Warden, Mr. Kalins and Mr. Hathaway.

Q. What was the conversation?

A. Well, it was whether we wanted to join the union.

Q. Who said that?

A. Mr. Hathaway. What he thought we would gain by joining the union and why hadn't we, if we wanted a different arrangement than we already had, hadn't we gone through the proper channels for doing it, such as, telling Mr. Warden and then he would go to Mr. Kalins and then up through Mr. Hathaway.

(Testimony of Roy Shroble.)

Q. Did you have anything to say at that meeting? A. No, sir, I said very little.

Q. Who else spoke besides Mr. Hathaway?

A. Mr. Newsom did most of the talking for us fellows. Mr. Kalins had a little bit to say and I believe Mr. Warden did too.

Q. What did Mr. Newsom have to say?

A. I believe he stated that it had been tried before, to get a little raise in wages. I believe it was along that line, and it never had helped in any way and we wanted to join the union. I have always been a union man and so have the rest of us, as far as I know. [81]

Newsom did all the talking at the time; I don't remember what all the conversation was about.

* * * * *

Q. Have you told us everything that you remember about the conversation in Mr. Hathaway's office?

A. Well, there was one statement that was made that it wasn't thought that we would gain anything by joining the union; that we had more privileges now than we would have if we did join the union.

Q. Who made that statement?

* * * * *

The Witness: It was Mr. Hathaway.

Q. (By Mr. O'Brien): The following morning did you have another conversation with Mr. Warden? A. Yes, we did.

Q. About what time was that?

(Testimony of Roy Shroble.)

A. I believe it was just before we started to work, a quarter to eight or 8:00 o'clock.

Q. Who was present?

A. Newsom, Tom Fowler and myself.

Q. What was the conversation on that occasion?

A. Well, I don't know too much, but one statement was made, he said he hoped our family affairs were in order so we could look for another job.

Q. Who said that? A. Mr. Warden.

* * * * *

Q. Did Mr. Shroble do any talking?

A. Not that I remember.

Q. Shortly thereafter did you have a private conversation with Mr. Warden?

A. Yes, I did.

Q. Where was that?

A. In the instrument shop.

Q. At which station? A. Silver Gate.

Q. About how long after the 16th?

A. Maybe a week or ten days. [83]

Q. Who was present?

A. Just him and myself.

Q. What was the conversation?

A. Well, Mr. Warden asked me if I considered myself an instrument man and I said that the company classified me as such and I figured I ought to get what other instrument men were getting in the rest of the industry. That was my reason.

Q. Do you remember whether the union was mentioned in that conversation?

A. No, sir, I don't.

(Testimony of Roy Shroble.)

Q. Do you recall a meeting in Mr. Hathaway's office after Mr. Newsom received his notice of discharge?

A. No, sir, I don't, not in Mr. Hathaway's office.

Q. Where was it?

A. It was on the floor above.

Q. Do you know whose office it was?

A. No.

Q. Was it at Station B? A. Yes.

Q. How did you receive word of this meeting?

A. I was the only man at the Silver Gate Station at the time. I was doing routine work and I was called to the phone and he asked me if I could get to Station B.

Q. Who called you on the phone?

A. Mr. Warden, if I remember correctly. [84]

Q. About what time was that?

A. About 9:30, I believe.

Trial Examiner Myers: In the morning?

The Witness: Yes.

Q. (By Mr. O'Brien): When Mr. Warden asked you if you could get to Station B, what did you say?

A. I told him at the time I had a piece of equipment out of service and as soon as I got it back I would get the truck and get there as quickly as I could.

Q. What time did you get to Station B?

A. A little bit before 10:30.

(Testimony of Roy Shroble.)

Q. And when you arrived at this meeting place, who was there?

A. Well, Ollie Webb, Fowler, Tony Botwinis, Mr. Kalins, Mr. Warden and Mr. Newsom.

Q. Was Mr. Hathaway there? A. No.

Q. Just Mr. Kalins and Mr. Warden of the supervisors? A. Yes.

Q. What do you recall of that meeting?

A. That was the meeting when they notified the rest of us that Mr. Newsom had received his notice of termination.

Q. Yes. What was the rest of the conversation at this meeting?

A. Just the charges, why they were discharging him from service and they stated three reasons why he was being discharged.

Q. By "they," whom do you mean?

A. Mr. Kalins.

Q. What did Mr. Kalins say was the reason for Mr. Newsom's discharge?

A. Well, one reason was that—I believe it was before my time—there was an omission in the log at one of the stations. I don't know if it was at Station B, but there was an omission in the log. I can't quite remember how that went, but it was one complaint.

The other one was putting the thermostat and gauges back on the No. 2 turbine and face plates had not been cleaned. I was with Mr. Newsom on that job.

The third cause was he had missed some controls

(Testimony of Roy Shroble.)

when they were putting Unit 1 back on the line.

Q. Do you recall anything else of the conversation at this meeting?

A. Well, there was a lot of talk about different things, but knowing the three reasons is what stays in my mind as to why he was discharged.

Q. Did you say you were working on that face-plate job? A. Yes, I was.

Q. Was it his responsibility more than yours to clean the face plates? [86]

A. Well, he was senior man; I was working with him.

Q. Is there any difference in your rate of pay?

A. At that time?

Q. Yes. A. Yes.

Q. Though you were both classified as Grade B? A. Yes.

Q. Do you have any knowledge as to why the numbers were left on the face plates?

A. Well, we were working Saturday at double time and Mr. Warden had asked us to finish up as soon as possible. The painters were going to paint the turbine either Sunday or Monday, I don't remember which. They had primed part of it at that time and we just left the numbers on the gauges on the faces because they had been cleaned while being calibrated and checked and just the numbers were on the face plates at the time.

Q. Were the indicators on the dials visible through these numbers?

(Testimony of Roy Shroble.)

A. Yes. In some cases, yes; in other cases, no, sir.

Q. Could you read the instruments?

A. Some of the gauges you could read because the number was right in the center of the gauge.

Q. Has every log you have turned in been absolutely perfect? [87]

* * * * *

The Witness: I have made a lot of omissions to the log that have slipped my mind at the time. I might have done it in the morning and might not have put it in the log until the next day. I could have missed it.

* * * * *

Q. (By Mr. O'Brien): Do you recall Mr. Warden announcing to the instrument technicians, generally, what Mr. Newsom's duties would be early in January? A. Yes.

Q. Can you fix the time?

A. It was approximately the first of the year, in January. [88]

Q. Was it before you signed the application?

A. Yes.

Q. What did Mr. Warden say about Mr. Newsom's duties?

A. He said that Mr. Newsom would have charge of routine at all stations for three months and during that time he would break in Mr. Webb at Silver Gate and Mr. Webb would break me in and I would break Mr. Fowler in for the routine work.

* * * * *

(Testimony of Roy Shroble.)

Cross Examination

Q. (By Mr. Luce): Mr. Shroble, your group of instrument technicians did not select any person as their spokesman or leader at any time?

A. No, sir, we didn't vote on it.

Q. I didn't ask you if you voted on it, I ask you if you selected anyone as your leader?

A. No, not in particular.

* * * * *

Q. As a matter of fact, Mr. Fowler did as much talking as Mr. Newsom at these meetings you attended at which officers of the company were present? A. No, I don't believe so.

Q. You don't believe he did? [89]

A. No, sir, Mr. Newsom did most of the talking.

Q. Well, Fowler did some of the talking?

A. He did a little, yes.

Q. And Newsom did more? A. Yes.

Q. Now, as near as you can, give us the exact language of Mr. Warden on that morning of January 16th.

A. Do you mean about looking for other jobs?

Q. Yes.

A. Well, all I can remember is he said he hoped our family affairs were in order so that we could look for other jobs.

Q. Didn't he say, "If you fellows keep this up you will be looking for other jobs?

A. I believe it is the way I said.

* * * * *

(Testimony of Roy Shroble.)

Q. Did you ask him what he meant?

A. I didn't have to. You don't have to with a statement like that. [90] * * * * *

Q. What were the family affairs that he referred to? * * * * *

The Witness: No, because in my own mind I had a good idea what that meant, as far as I was concerned.

Q. (By Mr. Luce): As far as you are concerned he might have been kidding? A. It is possible.

Q. And at the time you didn't construe it as being any threat that you would lose your jobs if you continued your union activity?

A. I believe I did. I believe I did a lot of thinking as to what would happen if I did continue this.

Q. Was anything ever said to you after that time? A. No, sir.

Q. You continued your efforts to have the union represent you? A. Yes.

Q. And there was no prejudice against you as far as you can see from that time on?

A. No, sir.

Q. Now, as a matter of fact, when you first had this conversation with Mr. Warden, on January 15th, he was very nice and said he would help you all he could? A. At that time, yes.

Q. He also said he would furnish the list of duties you could use in your application for union recognition? A. Yes, if he could get it.

Q. Did he furnish it to you?

A. I have never seen it.

(Testimony of Roy Shroble.)

Q. You know that he did furnish you with it? That he did furnish Newsom with it?

A. If he did, I didn't see it.

Q. If he did it would be after the conversation of January 16th?

Mr. O'Brien: I will have to object, Mr. Hearing Officer,——

Mr. Luce: I withdraw the question.

Q. (By Mr. Luce): I show you Respondent's Exhibit No. 1 and will ask you to state if you have ever seen that before?

A. No, sir, I have never seen that list.

Q. Now, in your conversations in Mr. Hathaway's office the afternoon of January 15th, Warden and Kalins being present, as well as the instrument technicians, there was nothing said at that meeting about the possibility of your having to look for other jobs? A. Not that I remember, no, sir.

Q. So far as you can remember, the only time anything was said by anybody by the company, in a capacity superior to you, in regard to the possibility of your losing your jobs, was this one remark that you say Warden made on the morning of January 16th, is that correct?

A. Yes, I believe it is.

Q. As a matter of fact, when Kalins was giving the reasons for the discharge of Newsom he stated more than three reasons?

A. Not that I remember, no, sir.

Q. Well, weren't there at least four reasons given?

(Testimony of Roy Shroble.)

A. Not that I remember. I remember the three he stated as far as the job was concerned. That is all I remember.

Q. Do you remember that Kalins read from some notes he had in his hand?

A. Yes, he had some notes.

Q. Didn't he give five general reasons why Newsom was being discharged?

A. Not that I remember.

Q. Where did you get your recollection of three reasons? Why did you say three reasons?

A. Just the statements that were made. What I remember is what I told Mr. O'Brien, about the omissions of the log, the controls and the face plates.

Q. These were the only three?

A. As far as I can remember; there may have been more, I don't remember.

Q. There may have been more that you now have forgotten? [93]

A. I could have forgotten, yes.

Q. The only ones present when this remark was made, "I hope your family affairs are in order," is Newsom, Kalins, Warden and yourself?

A. No, sir, Mr. Kalins was not there.

Q. Didn't you tell us that Mr. Kalins was there?

A. No, not when that statement was made. I said Mr. Newsom, Fowler, myself and Mr. Warden. Mr. Warden made the statement.

Q. Mr. Fowler was present? A. Yes.

(Testimony of Roy Shroble.)

Q. And Newsom, yourself and Warden?

A. Yes.

Q. Nobody else? A. No.

Mr. Luce: That is all. [94]

* * * * *

OLLIE E. WEBB

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. O'Brien): By whom are you employed?

A. The San Diego Gas & Electric Company.

Q. Your present occupation is what?

A. Instrument technician.

Q. Grade A? A. A. [95]

* * * * *

Q. When did you first enter the instrument department, approximately?

A. October of '49, I believe. October of '49, I guess.

Q. Who explained your duties to you, to begin with? A. Mr. Warden. * * * * *

Q. (By Mr. O'Brien): After that, whom did you work with? A. Mr. Newsom.

Q. For how long?

A. Approximately three months.

Q. Were you still learning your job when you were working with Mr. Newsom? A. Yes.

* * * * *

(Testimony of Ollie E. Webb.)

Q. What I am inquiring about is a meeting you had with Mr. Hathaway.

A. That was in the afternoon.

Q. That was the 15th, was it?

A. Yes, about that time. [97] * * * * *

Q. When you arrived at the meeting place, who was there?

A. Kalins, Warden, Mr. Newsom, Fowler, Botwinis, Shroble and myself.

Q. What do you recall of the conversation?

A. Well, in general, they wanted to know why we weren't satisfied; why we hadn't given them a chance to make us satisfied, and it was just small discussions of the union.

They said it had its advantages and also its disadvantages, but he didn't feel he wanted to stand in our way. He said to do as we thought best, but to give it a lot of thought. That is about the gist of it.

Q. That is all you recall of that meeting on the afternoon of the 15th?

A. Well, the question was asked why they didn't come to them before, and someone said they didn't feel it would do any good.

Trial Examiner Myers: Who said that?

The Witness: Mr. Hathaway.

Q. (By Mr. O'Brien): Do you remember what Mr. Hathaway said in regard to that?

A. He said they certainly could, but they weren't given a chance.

Q. Now, tell us about the 10:00 o'clock meeting. Can you fix the date for us?

(Testimony of Ollie E. Webb.)

A. I couldn't tell you the exact date.

Q. Would it be about the 1st of February?

A. Somewhere in that neighborhood.

Q. How did you receive word to be at that meeting?

A. I was working at the screen house and I got called to the telephone.

Q. Where was the meeting place?

A. It was on the fourth floor in what they sometimes use for a drawing room, the engineers.

Q. At Station B? A. Yes.

Q. Who was present?

A. Mr. Botwinis, Mr. Shroble, Mr. Newsom, Mr. Fowler, Mr. Warden, Mr. Kalins and myself.

Q. What do you recall of that conversation?

A. Well, it opened up and Mr. Kalins said, "Gentlemen, I am sorry but it is my painful duty to inform you that Mr. Newsom will be terminated." That is the way it started off and he gave the reasons.

Q. What were the reasons? [99]

A. Well, one of them was it seemed to be a shortage of work one day and they agreed that it was an omission from the log that hadn't been put down.

I believe one of them was that he couldn't get along with the supervisors and then there was some gauges put on a turbine with some screws left out or the faces were dirty or something like that, and then there was supposed to be a locked control on one of the boilers, an airflow meter. * * * * *

Q. Did you ever miss controls in approximately

(Testimony of Ollie E. Webb.)

two years you worked in the instrument department?

* * * * *

The Witness: Well, I recall that I neglected to turn a valve on a gauge to a gas pressure on one of the boilers.

Q (By Mr. O'Brien): If that hadn't been caught in time would the result have been serious?

A. Well, no, there is another gauge to go by, but it is very easy to miss one.

Q. You are saying there are duplicate gauges and one was reading and one was not?

A. Yes.

Q. And the operator, if he relied on the non-reading gauge, [100] could cause some damage?

A. Yes, it could. Well, in this particular case I don't think so, because he had another meter that registered flow and he would know how much he was putting in.

Q. Are you familiar with the control which Mr. Newsom missed?

A. I am not sure what control it was. I was not down to Silver Gate; I don't know which one it was.

Q. You have since become familiar with Silver Gate? A. Yes.

* * * * *

Q. Do you know whether a failure to hook up the control would do any serious damage?

* * * * *

A. No, there were two airflow meters there. If

(Testimony of Ollie E. Webb.)

they were both out of service, it could cause serious damage, but not with just one.

Q. So that error was about the same as you described as the one you yourself made?

A. I suppose so. [101]

Q. And has every log you have turned in been 100 per cent perfect?

* * * * *

The Witness: No, sir.

* * * * *

Cross Examination

Q. (By Mr. Luce): Now, you don't know what charges of incompetence were made in respect to Mr. Newsom, in their entirety?

I will withdraw that and reframe the question.

Do you know all of the charges that were made against Mr. Newsom?

A. I know those that were brought up in the meeting.

Q. Do you remember all of them that were brought up in the meeting, now?

A. Well, I remember those four as the ones. I believe I mentioned them, if I am not mistaken. They were the ones I remember.

Q. Could there have been others and you now have forgotten them? [102]

A. There could have been.

Q. Did Mr. Newsom at any time get into an angry discussion with Mr. Warden and Mr. Kalins over his discharge?

(Testimony of Ollie E. Webb.)

A. Well, there was some mud slinging back and forth.

Q. What did you mean by that?

A. Well, there was some argument going on at the end of the discussions.

Mr. Luce: Will you please read that answer for me?

(Answer read.)

Q. (By Mr. Luce): An argument between Mr. Newsom and his superiors?

A. Newsom and Warden.

Q. Were there angry words on the part of Mr. Newsom? A. They were both arguing.

Q. As far as Mr. Newsom is concerned were there angry words towards Mr. Warden?

A. Well, yes.

Q. Now, you didn't, at any time, hear Mr. Warden or Mr. Hathaway say anything about your losing your jobs, or possibly losing them, if you went on with the union activity?

A. Well, I wasn't down at the Silver Gate Station to get in on that conversation down there. The only thing I heard of that nature was when he came up and talked to us for a short while and he said he didn't think we were going to help ourselves any. [103]

Q. He didn't think you were going to help yourselves any, is that what he said? A. Yes.

Q. Did he say what he meant by that?

(Testimony of Ollie E. Webb.)

A. No.

Q. Now, in your conversation at the time of your meeting with Mr. Hathaway, he said, did he not, that he would not stand in your way and he would help you if you wanted to join the union?

A. He said he wouldn't stand in our way.

Q. And Mr. Warden was present at that time?

A. Yes.

Q. And Mr. Kalins? A. Yes.

Mr. Luce: I believe that is all.

Trial Examiner Myers: You said that when Mr. Warden was away you occasionally assumed some of his duties?

The Witness: Yes.

Trial Examiner Myers: When did that first happen?

The Witness: That started——

Trial Examiner Myers: Approximately when?

The Witness: I don't know, about four or five months ago, I would say. Down at the other station, it started a little bit earlier than that, maybe six or eight months.

Mr. Luce: May I ask another question?

Trial Examiner Myers: Yes, certainly. [104]

Q. (By Mr. Luce): Mr. Webb, was anybody designated as your spokesman at your meeting with Mr. Hathaway or Mr. Warden in regard to joining the union?

A. I don't believe anyone was designated.

Q. Did Mr. Fowler do some of the talking?

A. Yes, I believe he did some of the talking.

(Testimony of Ollie E. Webb.)

Q. And Newsom did some of it?

A. Yes, Mr. Newsom did most of the talking.

* * * * *

Redirect Examination

Q. (By Mr. O'Brien): When did you receive the last classification of instrument technician A?

A. I couldn't tell you the exact date, but it was about four or five months ago.

Q. That would be some time in March or April?

A. I suppose so.

Q. Now, bringing you back again to the morning meeting when Newsom's discharge was discussed, do you recall Mr. Kalins saying anything at that time about a possible reclassification for you? [105]

A. Mr. Hardway had written a letter or said something for some of us. I don't remember much about that.

Q. Does anything come back to you about your name being mentioned, specifically, by Mr. Kalins?

A. Well, the only thing that I remember my name being mentioned by Mr. Kalins was that he was more or less using me as a yardstick against Mr. Newsom.

Q. What did he say?

A. He said that you could send me out to do something and it would be done and he said he couldn't depend on Newsom. Those were about the words he said.

Q. Did he say anything about considering you as an A rating as a technician?

(Testimony of Ollie E. Webb.)

A. It seems to me like something like that was mentioned, but I don't recall whether it was at that time or afterwards.

Q. Well, at some other time, then?

A. Well, I was told that I was considered for an A technician.

Q. But do you recall some qualifications being put on that by Mr. Kalins? A. No, I don't.

Q. Do you recall Mr. Kalins say, in substance, that Newsom had not taken as much interest in the job as Webb had and that Webb had been considered far an A rating as technician, but the union activity had changed the picture and they didn't know what would happen until things were settled?

A. I believe I recall something to that effect.

Trial Examiner Myers: When was that statement made?

The Witness: At the morning meeting.

Trial Examiner Myers: That would be the February 1 meeting?

The Witness: Yes, at the meeting that we were notified of Newsom's discharge.

Trial Examiner Myers: Who made that statement?

The Witness: Mr. Kalins. [107]

* * * * *

Redirect Examination

Q. (By Mr. O'Brien): Now, that I have refreshed your recollection, what do you recall Mr.

(Testimony of Ollie E. Webb.)

Kalins saying about union activity in that connection?

A. Well, he said something to the effect that it was up to us if we wanted a union and in a lot of ways it would be easier for him, but if we have a union contract we would have to live up to it to the letter.

Q. Tell me, did Mr. Kalins say that Mr. Webb had been considered for an A rating, but that union activity had changed the picture and the company didn't know what would happen until things were settled?

A. He didn't say the company, he was talking about himself, personally.

Q. That they didn't know what would happen until things were settled? A. Yes.

Q. He said that?

A. To the best of my recollection.

* * * * *

THOMAS FOWLER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. O'Brien): Mr. Fowler, where are you employed?

A. San Diego Gas & Electric Company.

Q. Your present classification is what? [109]

A. Instrument technician B.

(Testimony of Thomas Fowler.)

Q. And how long have you been so classified?

A. Since last November. I worked since July as a helper in that department.

Q. You became a helper in the department in July?

A. I came into the department as a helper in July.

Q. Mr. Fowler, how long have you been working for the company? A. Since March, 1949.

Q. Were you present at the conversation with Mr. Warden at the Silver Gate Station on the morning before you signed General Counsel's Exhibit No. 2? A. Yes.

Q. That is January 15, 1951? A. Yes.

Q. Tell us what you recall of Mr. Warden's conversation and what anyone else present said?

A. Well, the evening before we had contacted the union and so that morning Newsom and Schroble and myself informed Mr. Warden we intended to join the union. We said we had contacted them and proceedings were on the way. Mr. Warden seemed enthusiastic, very nice, and immediately offered to help in any way he could.

Q. What was the next thing that happened that day?

A. That afternoon Schroble, Newsom and myself were informed by telephone call that Warden would come down to pick us up and he had arranged a meeting with Mr. Hathaway at Station B. He came down and picked us up and took us to the meeting in Mr. Hathaway's office. We were joined

(Testimony of Thomas Fowler.)

there by Webb and Botwinis who were working at the other station.

Q. What took place in Mr. Hathaway's office?

A. It was rather a premature thing. We weren't prepared to say anything and Mr. Hathaway was apparently without anything to offer so both sides sat there. I think Mr. Hathaway asked if we had anything to say, and I think Mr. Newsom said he understood we were here to listen. I don't remember the exact words, but that was more or less the sum of it.

Finally, Mr. Hathaway said they were sorry we took the action and why hadn't we come to him first. I believe he mentioned that this particular department might not be allowed to join the union due to the confidential nature of some of the papers we had access to. He said he didn't believe we would gain anything by joining the union and that we would lose certain privileges that we have now as non-union members.

Q. Do you recall anything else of that conversation?

A. No, there wasn't a great deal said.

He asked us to think it over and to submit a letter with our desires in it and he would take it through the channels.

Q. After leaving Mr. Hathaway's office, what did you do?

A. We went down to the union and had this statement notarized in triplicate and sent one to

(Testimony of Thomas Fowler.)

the union, one to Mr. Sherwin, the president and kept this one.

Trial Examiner Myers: When you say, "this statement," you mean the document which has been received in evidence as General Counsel's Exhibit No. 2?

The Witness: Yes.

* * * * *

Q. Did you have a conversation with Mr. Warden after the signing of General Counsel's Exhibit No. 2?

A. The following morning. We have an assignment session each morning and talk over what has been done and what needs to be done. He seemed very pessimistic as to our chances of getting into the union and in the conversation made a statement that he hoped our affairs were in order and we assured him we were prepared to look for other work, if necessary.

* * * * *

Q. Did you attend a meeting at Station B when Mr. Newsom's discharge was discussed?

A. Yes. [112]

* * * * *

Q. (By Mr. O'Brien): Tell us what you recall of that meeting.

A. Well, Mr. Webb and Mr. Botwinis and myself were working in Station B at the time. We were notified in the morning to be at the meeting with Mr. Warden; that he was coming down to meet him in the office and there was no reason

(Testimony of Thomas Fowler.)

given, although we knew from other sources what it was about.

While we were waiting for Mr. Schroble to get there, he was at Silver Gate at the time, there was some discussion of the union activity between Mr. Kalins and the group and Mr. Kalins said he had talked it over with other foremen in the plant who were union men, and he found that he could get along all right if he lived up to the letter of the union contract. He said we would lose certain privileges we had such as half a day shopping at Christmas time and other things of that nature. He also made a statement to Mr. Webb about his proposed promotion coming in some time during that meeting and then when Mr. Shroble came down they informed us that Newsom had been discharged; that he had been offered a chance to resign, to transfer or be discharged and then the reasons were given. The three reasons that have been mentioned before were stated.

Q. What I want is your rcollection, not somebody else's. [113]

A. The three specific charges that were made were the omission in the log, the lack of work in the log, which Newsom defended by saying there had been an omission, and it was left that way.

The gauges, which again he defended by the fact that it was Saturday, with double time and it had been expressed to him to finish up and get out and that they would be painted later.

Then, the air flow meter. * * * * *

(Testimony of Thomas Fowler.)

Q. Have you ever been guilty of an omission similar to that of the air flow meter as described by Mr. Kalins?

* * * * *

The Witness: Well, yes. I have left all the fuses out of a set of meters that you could not have told anything about the boiler at all. [114]

Q. (By Mr. O'Brien): And has every log you turned in been complete in all particulars?

A. No.

Trial Examiner Myers: What happened?

The Witness: Mr. Warden caught the omissions and I put them back in.

Trial Examiner Myers: What did he say to you about it?

The Witness: I don't remember. Nothing, in particular, other than I should be more careful. There was no recrimination at that time.

Q. (By Mr. O'Brien): All of your logs would not be 100 per cent complete?

A. On the routine, no. It has been very seldom that the routine has been kept up to date while I have been there. There aren't enough men to keep it up. We get the highlights and let it go at that.

* * * * *

Cross Examination

Q. (By Mr. Luce): Calling your attention to the conversation with Mr. Warden on the morning of the 16th, I believe you told us that he was

(Testimony of Thomas Fowler.)

very pessimistic about your chances of being taken into the union?

A. That was one thing he said. I don't remember the exact wordage.

Q. In substance, that was what he said?

A. Yes.

Q. Then, he said he hoped you were getting your affairs in shape? A. Yes.

Q. Then you said we assured him we were prepared to look for other work? A. Yes.

Q. He didn't say to you that you better be prepared to look for other work? A. No, sir.

Trial Examiner Myers: Did you make that statement that you were prepared to look for other work?

The Witness: I believe that was made exactly that way, I believe so, yes.

Trial Examiner Myers: How did you happen to say that?

The Witness: Well, from the nature of the proceeding it could only mean one thing. That we would have to get our affairs in order as far as the company was concerned, that is, financially.

Trial Examiner Myers: Meaning what?

The Witness: Meaning we could use our jobs over the union activity.

Trial Examiner Myers: What did he say when you made that remark?

The Witness: I believe the conversation was dropped there.

Q. (By Mr. Luce): You say that Mr. Warden

(Testimony of Thomas Fowler.)

expressed himself as being pessimistic in regard to your chances of joining the union?

A. Yes.

Q. Then, he said, "I hope you have your affairs in good shape"? A. Yes.

Q. Putting these two together, did you not realize that he meant he hoped you had your application in order to assist you in joining the union?

A. I didn't take it that way, no.

Q. He did, at that time, offer to help you, did he not? A. Yes.

Q. And did he furnish you or Mr. Newsom with a job classification sheet? A. Yes.

Q. He told you at this conversation on the 16th that he would furnish you with a job classification sheet?

A. I believe so. He did on the 15th anyway, I don't remember about the 16th. [117]

Q. On one day or the other? A. Yes.

Mr. Luce: I believe that is all.

Trial Examiner Myers: At this termination meeting of February 1st—you used the word "termination," because somebody used it before you —but at the meeting on February 1st could you tell us about what was said about Mr. Webb's proposed reclassification and who said it?

The Witness: Mr. Kalins, sir, along with the union discussion made the remark that Mr. Webb was up for reclassification as an A technician, but that there was some doubt about it now; that the

(Testimony of Thomas Fowler.)

union activity would hold it up until it was settled.

* * * * *

Mr. O'Brien: The General Counsel rests.

I don't think there can be any inference, but I suggest a stipulation that Mr. Botwinis is on military leave.

Mr. Luce: That is correct. [118]

Trial Examiner Myers: He is not available?

Mr. Luce: At least, he is no longer connected with the company. Where he is, I don't know, but he is in military service.

* * * * *

HAROLD L. WARDEN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [119]

* * * * *

Direct Examination

Q. Now, Mr. Warden, what is your present position? A. Instrument engineer.

Q. Employed by whom?

A. San Diego Gas & Electric Company.

Q. How long have you been employed for the company?

A. I first went to work in August, 1947.

Q. When did you first become instrument engineer? A. March, 1949.

Q. And will you tell us, briefly, what the duties of an instrument engineer are?

A. My duties at the present time consist of all

(Testimony of Harold L. Warden.)

instrumentation pertaining to both stations, Station B and Silver Gate,——

Q. Let me interrupt you there to ask if your duties were the same during 1949, '50 and '51?

A. Yes, they have been the same during that time.

Q. Also, that the record may be clear, Station B is a power plant operated by the San Diego Gas & Electric Company at the foot of Broadway in the City of San Diego? A. Yes.

Q. And the Silver Gate Station is another power plant operated by the San Diego Gas & Electric Company situated out in the east end of town, I believe? [120]

A. It is at the foot of Sampson Street.

Q. Do your duties as instrument engineer take you to both plants? A. Yes, they do.

Q. Will you proceed further and tell us what your duties are and were during all the time involved herein, 1949, '50 and '51?

A. My duties consist of seeing and servicing the routines at both stations; satisfying the desires of station chiefs; that is, Mr. Zitlaw of Silver Gate and Mr. Campbell of Station B; working in direct alliance with Joe Kalins, efficient engineer, in development work; installation of new instrumentation; the change of design of existing equipment, and in general covering both stations, in full responsibility of instrumentation.

Q. What would be your duties in respect to

(Testimony of Harold L. Warden.)

what is called instrument technicians, both A and B?

A. In principle, the instrument technicians Grade A are directly responsible to me, and the instrument technicians Grade B are likewise responsible to me, but usually they work through the direction of instrument technician A, if the instrument technician A can be at a particular Station. But as previously stated, my work is between two separated stations, some distance apart, and therefore I can't be at either place simultaneously. Therefore, we have the classification of instrument technician A, as it is our duty to try to cover both stations to the best of our ability under all existing conditions.

Q. Will you tell us what the duties of the instrument technicians are?

A. Instrument technicians are assigned the duties and are required to be able to overhaul, completely, any of the existing equipment that we have at either station.

Q. By equipment, you mean instruments?

A. Yes, being able to satisfactorily perform the routine work as outlined in explicit details at both stations.

Q. Will you give us some idea of the form of the work of these instrument technicians?

A. All of our work, including the instrument technician work, is of such a nature that errors, lack of accuracy, being lackadaisical, or, perhaps, you might say, not caring too much or not paying

(Testimony of Harold L. Warden.)

strict enough attention to the job, can be very detrimental in the matter of station efficiency. It even could, under hazardous operation, cause plant damage or personnel damage.

Q. In order that the Board may have the information on the record, will you just tell us what the capacity is, first of the Silver Gate Station?

A. At the present time, Silver Gate is rated at 160,000 megawatts.

Q. At Station B?

A. Approximately 100,000 megawatts. [122]

Q. These two stations supply electricity to the City of San Diego and to the County of San Diego?

A. Yes, we cover the area as far north as Capistrano, east to the Borego Desert and south to the Mexican Border.

Q. There are no other plants other than the two mentioned?

A. There are no other plants in San Diego County.

Q. These men, technicians B, have the job of keeping in order and inspecting the instruments in these two plants? A. That is correct.

Q. And an error in their work or carelessness in their work might cause great damage to the plant, might it not?

A. It could very easily.

Q. What effect might it have on the general affairs of the city in the production of electricity?

A. In the event there was a loss of one or more units it would curtail the supply of electricity in

(Testimony of Harold L. Warden.)

San Diego County and the City of San Diego to quite a large extent.

Q. What do you mean by "unit"?

A. At Silver Gate we have three units. One 40,000 and two 60,000 megawatts.

Q. Now then, Mr. Warden, when did you first become acquainted with Mr. Newsom?

A. When he came to the instrument department as instrument technician while Mr. Geiger was the instrument engineer. At that time I was an instrument technician. [123]

Q. That was about when?

A. That was about two and one-half years ago.

Q. Was Mr. Newsom under you at that time?

A. No, sir, he was not. He was under the direct supervision of Mr. Geiger.

Q. When did you become instrument engineer?

A. I became instrument engineer in 1949.

Q. At that time, where was Mr. Newsom?

A. At that time Mr. Newsom was at Station B.

Q. And after you became instrument engineer, did Newsom come under your direct control?

A. Yes.

Q. Will you give us a brief summary of the character of the work of Mr. Newsom from the time you became instrument engineer until his notice of discharge?

A. Mr. Newsom's work was spasmodic. I believe that would be good terminology for it. There were periods at which times he did very satisfactory work, and other periods of time where it was not

(Testimony of Harold L. Warden.)

satisfactory and could not be claimed so because of the manner in which it was performed. It did not create and establish within the minds of supervisors, operators and station chiefs, as well as other men in supervision, a confidence in his work. The manner in which he was performing his work was not satisfactory, not only to myself, but to many others.

Q. When did you first discover this defect of his work? [124]

A. The first time I found there was sufficient disturbance among the supervisors, station chiefs and supervising personnel, in general, was, I believe, in May, 1949.

Q. What did you do about it?

A. At that time, particularly, I spoke to Mr. Newsom in private and explained to him that the type of work we were doing necessarily required considerable confidence from the operating personnel and supervisors and I had been informed by a reliable source, namely, Mr. Zitlaw, the station chief at Silver Gate, that he had not been satisfied in the nature which Newsom was performing.

He was spending considerable time at Silver Gate without direct supervision because at that time we had additional work to be done at Station B and I was spending considerable time at Station B. I did not observe this lack of successful work, personally——

Q. I am asking you now about your conversation with Newsom?

(Testimony of Harold L. Warden.)

A. I explained to Newsom that the nature of our work is such that we had to establish confidence with the operating men and also the station chiefs and that I thought he was capable of doing it; that he should do it. He assured me he could do it and that he was satisfied in his own mind that he would be able to do that work thereafter.

Q. Now, what did you observe in regard to the character of his work after that conversation?

A. A definite measured output, seemingly to fulfill the requirements of the job almost to the letter, but nothing more.

This continued for a period of perhaps two or three months and then, again, returned to this period of unsatisfactory work with short periods of doing a pretty good job.

Q. What did you do then?

A. At that particular time I contacted John Hardway who was my immediate superior as efficiency engineer.

Q. Did you have another conversation with Mr. Newsom?

A. Before I answer that, am I at liberty to make a correction of my earlier statement?

Q. Yes.

A. The date is October, 1948.

Q. That is when you had the first conversation with Newsom?

A. Yes, it was in October, not May.

Q. October, 1948?

Trial Examiner Myers: 1948?

(Testimony of Harold L. Warden.)

The Witness: No, October, 1949.

Q. (By Mr. Luce): You had a conversation with Mr. Hardway? A. That is correct.

Q. Did you, after that, have a conversation with Mr. Newsom?

A. I spoke to John in regard to his letdown, his work output and not being too satisfactory. John said perhaps if he had a talk with him the results would be better.

Q. By "John," do you mean Mr. Hardway?

A. Yes.

Q. Were you present when Mr. Hardway talked to him? A. Yes.

Q. When was the conversation between you and Hardway and Newsom?

A. I believe it was in May, 1950.

Q. May, 1950? A. Yes.

Q. Will you tell us what that conversation was?

A. At that time Mr. Hardrway spoke to Newsom and told him that he was sure he was capable of producing a much higher grade of work than he had been doing.

Mr. Newsom asked for a specific example, and one of the examples at that particular time was as shown by the log that the quantity of work produced by Newsom at Station B was not very large. It was during that period of time that this omission, lack of having a complete or 100 per cent log, was brought to light.

However, that was only used as one of the many

(Testimony of Harold L. Warden.)

examples, and was offered to Mr. Newsom, as an example, not as the only case.

Q. What did Newsom say during this conversation when you were present?

A. He made the statement at this particular meeting that he liked instrument work and was very desirous to make good in it. Other details of the conversation at this time I cannot remember.

Q. What occurred after that conversation with Mr. Hardway?

A. After that a very similar return of periodic good work followed by periods of poor work started and continued through until September, 1950.

Q. What happened then?

A. At this time I went to Mr. Kalins, who had become efficiency engineer due to Mr. Hardway being on military leave, and explained that we had had one previous meeting with Newsom; that I had also spoken to Newsom once myself before that.

My recommendation to Mr. Hardway was that he either transfer or remove him from the instrument department.

Q. Was your recommendation to Mr. Hardway or Mr. Kalins? A. To Mr. Kalins.

Q. Then what happened?

A. Mr. Kalins went to Silver Gate with me, we called Newsom into the office, and Mr. Kalins started questioning Newsom in regard to his work output, the sloppiness in nature, the lack of exactness and preciseness of the work.

(Testimony of Harold L. Warden.)

Mr. Newsom, again, asked for specific examples, one of which was quoted in regard to the gauges installed on Unit II in such a manner that they were not satisfactory as far as operations were concerned. That was offered as one of a number of instances. It was not the only one, it was just a specific instance.

During this meeting in which Kalins, Newsom and myself were present, the point was brought up that if Newsom's work did not become satisfactory and remain so, it would be necessary for him to leave the department. Mr. Newsom questioned me twice on that, asking me what I meant, and I said that he would be through, that he could no longer work in the instrument department. I repeated that twice during the meeting.

Q. What was his attitude at that time as expressed by his words?

A. Following that meeting a very definite appearance of measured output.

Q. Before you come to that, what was the attitude of Mr. Newsom at this meeting of you, Kalins and Newsom in regard to his showing of respect to you?

A. A considerable disrespect.

* * * * *

Trial Examiner Myers: Will you reframe the question, Judge?

Q. (By Mr. Luce): What did Mr. Newsom say and do in that meeting. [129]

A. The exact wording I cannot remember, but

(Testimony of Harold L. Warden.)

his respect to both myself and Mr. Kalins was of utter disrespect. He had no respect whatsoever for either Mr. Kalins or myself.

Q. How did he express it? Give us, in substance, what he said.

A. In asking for a specific example, and when they were given to him, coming back with an excuse, perhaps you might call it an excuse, such as the gauges were installed on Saturday.

I believe his comment was something to this effect: "You certainly wouldn't expect me to spend double time merely wiping off the faces of gauges." In other words, criticizing in a very sarcastic manner, and apparently trying to show an influence of rebellion against honest criticism.

Q. Was anything said by you or Kalins in regard to his attitude toward you at that time?

A. Yes, he was told if his attitude did not change and he show proper respect not only to myself but to other superiors his termination of employment would be requested.

Q. Who said that? A. Mr. Kalins.

Q. After that meeting what occurred?

A. The work output was of a measured nature, just barely doing enough to fulfill the requirements of the job.

It was following the September meeting that we lost Unit I at Silver Gate. That was a burnup unplanned, I might add, and it was 40,000 megawatts cut out from our system which made quite a hole in our total capacity.

(Testimony of Harold L. Warden.)

As you might visualize, starting the first of September, the load demand by the consumer gradually increases by the additional use of electricity for lighting, so it was with much emphasis that we placed Unit I in primary importance getting that machine back on the line and into operating condition to the best of our ability.

We were also saddled with the continued testing on Unit No. III and these tests were to determine modifications necessary to that unit which had only been installed, I believe, in August of 1950. It was very necessary that we obtain this information and tests and so forth, from Unit No. III so that ample time from the manufacturer might be had to produce equipment necessary to make that change.

This change is now in progress at Silver Gate and we hope it will be completed in possibly two or three more weeks.

Q. Well, what work after September was done by Mr. Newsom?

A. Mr. Newsom, at the beginning of Unit I overhaul, was offered the opportunity of becoming lead man because of his seniority. Even though a lead man does not carry any additional compensation, we usually term lead man without official title. He was offered the opportunity to show himself as a lead man to lead out in the Unit No. I overhaul. I gave him the Unit No. I overhaul schedule folder complete and told him to proceed with the overhaul the best he could; that in any

(Testimony of Harold L. Warden.)

event any difficulty arose on the overhaul he was not familiar with and did not understand or could not complete satisfactorily, he should contact me and we would get together on it and complete it in a satisfactory manner. That has been my instruction to all men and I am sure they will substantiate that.

Q. Let's get the factual part. How long did Mr. Newsom take on the overhaul program?

A. The overhaul extended on through until after the 1st of January.

Q. Then, what did you do, on or about the same time, in regard to change of his duties?

A. Somewhere near the 15th of January, just preceding the 15th—I believe the 15th of January arrived on a Monday and it was the week previous to that that I told Mr. Newsom it was our plan to use him on the routine at Silver Gate from the 15th of January until the last of January, exclusively.

In other words, he would be on routine at Silver Gate for the remainder of the half of the month of January. Starting with the 1st of February, it was our desire to use him as routine man at both stations. The routine can very nearly be handled by one man, except in some instances of tests where it is physically impossible for one man to be in two positions.

Q. Did you have any opportunity to observe the character of the work he had performed from September to January on the overhaul project?

(Testimony of Harold L. Warden.)

A. Only in a very limited manner because of the duties required of me on Unit III tests and other related duties.

Q. When did you first learn of the rumor of the technicians to become members of the union?

A. My first knowledge of that was on the morning of January 15, 1951.

Q. And to whom did you talk at that time?

A. Fowler, Newsom and Shroble met in my office that morning and they informed me they had had a meeting the night before, at which time they discussed the instrument men joining the union. However, nothing had been settled to date.

Q. What did you say to them?

A. I told the men I would assist them in any manner that I could, with the understanding, of course, that in my position as instrument engineer I could not guarantee them any specific things without first getting a release from Mr. Kalins and the proper supervisors above.

Q. Then what next happened in regard to the technicians?

A. During this time in the morning there was general conversations in regard to their union ideas. I don't recall whether it was Newsom or Fowler, but one or the other brought up the point of comparisons between the existing salaries of our company and the salaries with the companies up north. [133]

After the talk with the men, perhaps 35 minutes to an hour, I came to Station B at which time I

(Testimony of Harold L. Warden.)

contacted Mr. Webb and Mr. Botwinis, who were working at Station B. I talked to them for a matter of some 15 to 20 minutes and made the same statements to them that I had previously made at the Silver Gate Station, namely, that I would assist them in any way I could by producing records, figures, facts or anything I could produce in a manner not exceeding my ability or going over the heads of my superiors.

After that I went to Mr. Kalins' office, reported to him the information the men had passed to me. Mr. Kalins and I went to Mr. Hathaway and talked to him about that and Mr. Hathaway said if the men desired a meeting with him that he would be very happy to arrange such a meeting.

I came back down from Mr. Hathaway's meeting with Mr. Kalins and I talked to Mr. Webb and Mr. Botwinis and explained to them what Mr. Hathaway had offered, but had not requested. It was an offer of openness on the part of Mr. Hathaway that if the men desired a meeting he would like very much to talk with them, but Mr. Hathaway's instructions to me was not to make that a form of request from him.

I called Silver Gate and explained to them the same reason of this meeting. I don't recall who said it, either Newsom or Fowler, but the statement was made, "Well, I don't see how it would do any good, but it can't do any harm." [134]

I brought the men up from Silver Gate and we all met in Mr. Hathaway's office. Mr. Hathaway,

(Testimony of Harold L. Warden.)

Mr. Kalins, Mr. Newsom, Shroble, Fowler, Webb and Botwinis, together with myself, were present. I believe Mr. Hathaway's opening statement was, "Who is the spokesman for your group?" He was answered that no one had been appointed officially as spokesman.

Q. Do you know who made that statement?

A. I think it came from all persons involved. I don't believe there was an exact statement that there had been none, but there was a blank look on their faces and a negative head shaking that there had not been an official spokesman appointed.

* * * * *

HAROLD L. WARDEN

a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Luce: Will the reporter please read the last few questions and answers at the end of yesterday's hearing?

(Record read.)

Q. (By Mr. Luce): Will you repeat, briefly, what was said at that meeting with Mr. Hathaway?

A. We met in Mr. Hathaway's office. Mr. Hathaway's opening question was, "Who is the spokesman for the group?" No spokesman was indicated as having been named.

From that point, Mr. Hathaway said, "What is

(Testimony of Harold L. Warden.)

this all about?" He said something to that effect and then I believe Mr. Newsom made the remark, "We came up here to listen, and not to talk." Mr. Hathaway asked the men, "What are you dissatisfied with," or "Is it anything other than money matters?" The entire group assured Mr. Hathaway that money or wages were the only items involved. Mr. Hathaway asked the men why they had not come to him first, and they told him they felt it would not have done them any good; that by going to the union they felt it was their best manner in obtaining their demands for more wages.

Mr. Hathaway explicitly informed the men of the company's enjoyable relations with the union at the present time. He said that we had never had any real difficulties. Of course, there had been negotiations between the union and the company which had gone to arbitration, but the relationship between the company and the union had been excellent. Mr. Hathaway said it made no difference whether the men worked as a union group or not; that it had worked successfully in other departments where the men belonged to a union.

Mr. Hathaway suggested to the men that they consider the advantages of joining the union and of not joining the union versus the advantages and privileges which they now have as not being members of the union. He left this decision totally to them and told them to consider, that they should well have established in their minds their desires and their wants.

(Testimony of Harold L. Warden.)

At this particular meeting it was brought out that no official action had been taken as far as asking a union to be their representative at that time.

Q. You stated that it had been brought out. Who stated that? [139]

A. It was the men in the instrument department, Botwinis, Fowler and Newsom. They said that at that particular time there had not been any official action taken as far as asking a union to be their representative.

Q. Then what further was said by either Mr. Hathaway or members of the instrument group?

A. I reiterated my statement that I would assist the men in any manner that I could. Mr. Hathaway substantiated that and said he would likewise work with the men through me in any manner he could, such as supplying them with information that might be necessary for them to prepare a complete and satisfactory demand or request for money.

Q. Now, what was the final statement made, if any, by the men of the instrument group when the meeting closed?

A. The meeting was concluded by the statement from the men that they would consider and let us know at a later date their official desires or a decision.

Q. Now this meeting was in the afternoon of the 15th, is that right? A. Yes.

Q. Did you talk to the men again on that date?

A. Yes.

(Testimony of Harold L. Warden.)

Q. With whom?

A. After we left Mr. Hathaway's meeting we all went down to the instrument shop at Station B. There was a general conversation; the specific details at that particular meeting I do not remember. It was a general discussion of whether or not the men could or could not receive an increase in salary. There was no specific talk in regards to whether or not the men would or would not join the union. The question primarily discussed after the meeting was whether or not the men would be able to obtain more money.

Q. When did you next talk to them?

A. The following morning, which is January 16th.

Q. And with whom? Where did this conversation take place?

A. It was at Silver Gate Station in my office, about 7:30 in the morning.

Q. Who was present?

A. Newsom, Fowler, Shroble and myself.

Q. Tell us what you said at that conversation.

A. At that meeting Mr. Newsom and Mr. Fowler informed me that official action had been taken in the form that they had dictated a letter, copies of which were sent to Mr. Sherwin and also to Mr. Jewett.

Q. What was said?

A. Following that official declaration of their intentions to continue with union activities, I suggested to the men that they have their facts, figures

(Testimony of Harold L. Warden.)

or substantiating evidence, and so forth, in regard to their demands in very good condition; that it would be necessary for them to have a good clean case for their demands for more money. I advised the men to think this over very carefully and not go up to the union with a case of demands for more money without supporting facts; that they should have all of their affairs connected with the union activities in first-class condition before they presented it, because if they should present a demand for more money and not have it substantiated with facts and figures, undoubtedly their demands would be refused. In the event their demand would be refused, it would be doubly hard for them to again open demands for more money.

Q. Did you offer to do anything at that time to assist them?

A. No specific offers at that particular time.

Q. You did prepare a job classification?

A. That request was made to me after that time.

Q. You did furnish them with this document that we have in evidence here, Respondent's Exhibit No. 1? A. Yes, I did.

Q. At that meeting you have just spoken about, on January 16th, did you say to these men or in the presence of Newsom or any of them, "Your position doesn't look so good. If I were in your shoes, I would get my affairs in order as you might be looking for another job"? A. No, sir.

Q. Did you say anything similar to that or with similar meaning? [142]

(Testimony of Harold L. Warden.)

A. As near as I can remember my statement to the men at that time was that they should be prepared to push their demands for more money in a business-like manner and in a complete manner.

Q. Did you say anything to them from which a meaning could be taken that they are liable to be out of a job or are liable to have to look for a job because of their union activities?

A. No, sir.

Q. Did you at that time say to any of them that "If you fellows keep this up you will be looking for another job"? A. I did not.

Q. Did you say to them or in their presence, or at any other time, "You better have your family affairs in order so you can look for another job"?

A. No, sir.

Q. You never said anything like that?

The nearest I said to that was "their personal affairs."

Q. In what connection did you say that?

A. In regard to their demands for more money.

Q. Was it different than what you have already told us? A. No, sir.

Q. Now, after this meeting of January 16th, was the matter again discussed with the men before January 30th or 30th?

A. Yes, on several occasions before working hours at Silver Gate we talked about the demands for more money. [143]

Q. And what was said on those occasions?

A. On one of these occasions the question was

(Testimony of Harold L. Warden.)

put to me, during the conversation talking about instrument men's work, as compared in the San Diego Gas & Electric Company to other utilities up and down the coast, if the comparison would be made if and when the men asked for more money. It was at one of these meetings that they asked if I could obtain for them a job classification from our company.

I told them I could, and Newsom said, "Yes, we might as well get it if nothing more than for laughs."

Q. Did you obtain that?

A. Yes, it required about three days to have this job classification secured by going through my immediate superiors to the personnel department.

Q. When was it determined and in what manner that Newsom's job should be terminated?

A. It was on January 30th at a regular meeting which is held once a week. This meeting is called by Mr. Hathaway and his immediate men working under him, station chiefs, efficiency engineer, and so forth. At this meeting Mr. Kalins and myself were present.

Q. Before you come to that, tell us who else was present at this meeting.

A. Mr. Hathaway, Mr. Zitlaw——

Q. Can you tell us what position they occupy with the company? [144]

A. Mr. Hathaway is superintendent of electrical production.

Q. Mr. Zitlaw?

(Testimony of Harold L. Warden.)

A. Station Chief at Silver Gate; Mr. Campbell, Station Chief at Station B; Mr. Kalins, Efficiency Engineer, and myself, Instrument Engineer.

Q. Then state what occurred at this meeting.

A. At this meeting Mr. Kalins and myself presented a proposed training program for the instrument crews. This program was discussed by all members present and a time set as to when the class would be started. The reason for the time being in the immediate future was the necessity of getting the training program completed prior to overhaul.

After this proposal had been discussed and accepted unanimously by all present, the question came up, "How are your men doing in the department?" I believe Mr. Hathaway is the person who directed the question to me. I said, "the men were all doing fine except Newsom." At this time further discussions were had in regard to why Newsom's output of work was not satisfactory. It was then asked, "What should we do about this man?"

After discussing it in some detail among all of us present, it was unanimously decided that the man be given his termination of employment the following day.

Q. During the discussions was it brought up or discussed at that time if it had anything to do with his union activity? [145] A. Yes.

Q. What was said about that?

A. Mr. Hathaway said that in an earlier meeting that he and Mr. Jewett were talking and Mr. Hathaway told Mr. Jewett that one of the men, and

(Testimony of Harold L. Warden.)

I am sure Mr. Hathaway did not mention any one specifically——

Trial Examiner Myers: Just tell us what you know. You were not present at this meeting?

The Witness: No.

Trial Examiner Myers: Tell us what Mr. Hathaway told you.

The Witness: Mr. Hathaway told me that he had told Mr. Jewett that one of the men who was in the group that were making application to become members of the union was under a shadow because of the fact of unsatisfactory work. Mr. Jewett's reply, as stated by Mr. Hathaway, was that if a man was in our department and was not doing satisfactory work that it would not be necessary to retain him in any manner and it would have no effect whatsoever on the men's union activity or the application for membership.

Q. (By Mr. Luce): Mr. Jewett, at that time, was business agent for the union, is that correct?

A. That is correct.

Q. What else was said, if anything, at that last meeting in regard to union activities?

A. I recall nothing further said about union activities. [146]

Q. When they discussed the work of Mr. Newsom, did you go into details about what had been the character of his work or the quality of his work?

A. Yes.

Q. Was it discussed by all of those present?

A. Yes.

(Testimony of Harold L. Warden.)

Q. You say the decision was unanimous to terminate his employment? A. That is correct.

Q. That was held on January 30th?

A. Yes.

Trial Examiner Myers: All persons at that meeting were supervisors?

The Witness: Yes, all persons who attended the meeting were in the supervisory status.

Q. (By Mr. Luce): The next day were you present at a meeting wherein Mr. Kalins told Mr. Newsom that his job had been terminated?

A. Yes, I was.

Q. I should say his employment was terminated.

A. Yes, I was.

Q. Who was present?

A. Mr. Kalins, Mr. Newsom and myself.

Q. That meeting was on January 31st?

A. Yes. [147]

Q. There has been something said about it being on the 1st.

A. It is my recollection that it was on the 31st.

Q. Who was present?

A. Mr. Kalins, Newsom and myself were at that meeting.

I had brought Newsom from Silver Gate to that meeting per my instructions from Mr. Kalins of the previous day.

He told Newsom that it was his unpleasant duty to inform him that his termination of employment would be effective two weeks from that date, estab-

(Testimony of Harold L. Warden.)

lishing February 14th as the actual date of completion of employment.

Mr. Kalins told Mr. Newsom the reasons for his discharge were as follows: His lack of ability to cooperate with his superiors; his unsatisfactory work, both in the form of quantity and quality; that his work had not been satisfactory because of the sloppy or inaccurate, incomplete manner in which he had performed his work; that his work output had been measured output, just barely enough to fulfill the job; that due to his inaccuracy and sloppy nature of work a loss of confidence had been brought about in the operating personnel and supervisory personnel because of the dependability of the instruments, and so forth, had created a feeling in the supervisory men that they couldn't depend on that equipment.

He was also told that his lack of initiative or desire to become a leadman and to lead out in the crew, due to the fact he was a senior man, was another reason for his discharge. [148]

Q. What did Newsom say?

A. Newsom said he couldn't understand that, that he felt it was a direct blow in regard to the men and an endeavor on the company's part to stop their union negotiations, and that he would like the statements made in the presence of the entire group.

Q. Go ahead and tell us what was said by any of the people present at this first meeting.

A. Newsom became quite highly indignant——

(Testimony of Harold L. Warden.)

Mr. O'Brien: I move the last remark be stricken and the witness be cautioned.

Trial Examiner Myers: Just tell us what he said.

The Witness: Mr. Newsom made the statement that he would like this meeting to be called for the reason of putting me, and named me by name, on the spot before the men.

Q. (By Mr. Luce): Do you remember anything else?

A. He asked for specific examples pertaining to these reasons that were given, and the example given to him in regard to the sloppiness of work was an example of many of these shortcomings. It was the gauge detailed at Silver Gate when the gauges were installed without proper securing and with dirty faces, dirty glasses.

The fact that he had been asked to check the boiler at Unit 1 prior to warm up and that he had reported to me that the boiler had been completely checked and found satisfactory. [149] The emphasis placed upon this start up was also told Newsom. Due to the fact it was on a Friday, and the work being done, a fire, the warm-up, could be put in the boiler and continued during the week end, when none of the instrument men would be there, it was necessary that we have all the details for a start up completed.

These were explained to Newsom as examples of his sloppy and inaccurate type of work.

Q. Was anything said at that time about the

(Testimony of Harold L. Warden.)

temperature recorders not working? A. Yes.

Q. Tell us what that was.

A. In connection with this check on Unit No. 1, prior to the start up, in addition to the airflow mechanism which has been mentioned, a number of the temperature recorders were found inoperative and it was necessary for us to check these out again and find out the reasons why they didn't work and put them in an operative manner.

These temperature recorders are very necessary to a start up.

Q. There was this meeting with the men present?

A. Yes.

Q. When did that happen?

A. Shortly after the meeting with Mr. Kalins, Newsom and myself. [150]

Q. State what occurred at that meeting and what was said by the various parties present.

A. When I arrived in that meeting, having gone to Silver Gate to bring Shroble up, Mr. Kalins again told the men and Newsom, as a group, it was his unpleasant duty to inform Newsom of his termination of employment, and stated the reasons which I have just related for his discharge or his termination.

Q. Then what did Newsom say?

A. Mr. Newsom brought up a number of things, I am not sure——

Mr. O'Brien: I will have to object, Mr. Examiner, the question was, "What did Mr. Newsom say."

(Testimony of Harold L. Warden.)

Mr. Luce: I don't believe he answered that question.

Trial Examiner Myers: What did Mr. Newsom say?

The Witness: To the best of my memory of that meeting, Mr. Newsom said that I had failed as a supervisor because of little personal actions on occasions that happened. One of these was that he accused me of being perturbed at him because he hid coffee away from me at Silver Gate; that we were working together one evening and he left the job and when he returned to the job I asked him where he had been. He said he had stopped out for a while and that I said I have smelled coffee on his breath and had at that time become very belligerent toward him.

Q. (By Mr. Luce): What was said by Mr. Kalins or you in [151] regard to the answer to Newsom?

A. I felt the charges——

Q. What did you say?

A. I said nothing.

Q. What did Mr. Kalins say?

A. He did not answer these specific charges that were made by Newsom.

Q. Was anything said by the other men present?

A. The other men listened quite intently to what was going on. One statement that I recall Mr. Fowler having made was that it appeared that Newsom's discharge was an unfortunate thing at this particular time because of the commitments that the

(Testimony of Harold L. Warden.)

men had made to one another in regard to backing each other in the union activities or negotiations.

Q. Was anything said in answer to that?

A. Nothing was said.

Q. Have you given us about all the substance of the conversations at that meeting, the second meeting, on January 31st?

A. There were considerable other accusations made, the text of which I do not recall because of the nature in which they were made. It didn't make too great an impression on me at that time.

Q. Were they accusations against you?

A. Yes.

Q. By Newsom? [152]

A. Yes. I have one other memory that I would like to make at this time.

During the discussion at this meeting Mr. Newsom said that he would take this thing—those were the words I believe he used—as far as he could in any court that was available for him, if for no other reason than the nuisance value.

Q. Now, at one of these meetings on January 31st, was there something said to Newsom about what he could do about terminating his employment as instrument technician? A. Yes.

Q. What was said?

A. Mr. Kalins said to Newsom that he could apply to personnel for a transfer, that he could resign or could be discharged.

Q. What was his reply?

(Testimony of Harold L. Warden.)

A. That he didn't know what he wanted to do at this time and he would let us know.

Q. Did you ever receive that information? Did he ever let you know?

A. Yes, the following day, either the following day or the second day following, I contacted Newsom to see if he had made a decision and what it was. I said it was important to me to know if he had desided to resign or to be discharged so that we might put into operation the mechanics necessary in writing up his discharge; that if it were a resignation there [153] was the fact of making payment for his vacation which he had not received as yet. If it was a discharge, the accounting would necessarily be different from a resignation.

Q. What did he say?

A. He said, "I cannot resign."

Q. Was anything said at that conversation about his transfer?

A. There was no mention made of transfer.

Q. He said, "I cannot resign"?

A. He said, "I cannot resign".

Q. Did he ever say anything to you about a transfer? A. No, not to me.

Q. At one time was Newsom given charge of an overhaul program?

A. On Unit No. 1 Newsom was given an overhaul schedule and told to proceed.

Q. About when was that?

A. It was near the middle of September, I don't have the exact date fixed in my mind as to when we started the Unit 1 overhaul.

(Testimony of Harold L. Warden.)

Q. That is of 1950? A. Yes.

Q. How did he conduct that overhaul program?

A. He conducted the work in such a manner that it created to me an impression that a job had not been well done.

At the mere completion of the Unit 1 overhaul, I found [154] it necessary to go in and supervise the completion of the overhaul detail so that a good overhaul might be assured.

Q. Was there an incident at one time in regard to Newsom signing the wrong name?

A. Yes.

Q. Will you give us the details of that?

A. The details, as best that I have them, were that in the early part of the month of February, 1951, I was checking the routine record which is maintained at Silver Gate. I came across the alarm check record of 1950 and there was a column on that record dated 1/23/51, under which was the name "Webb," and below the name a complete alarm check record. I took this record out to the instrument shop where Newsom was working and asked him what about it. He looked at it and took out an erasure and said, "I put that down just for laughs." I removed the paper from Newsom and brought it back into the office.

Trial Examiner Myers: This was in 1951?

The Witness: Yes.

Trial Examiner Myers: When was the date of the job?

The Witness: The alarm check of the job was

(Testimony of Harold L. Warden.)

dated 1/23/51 and that was placed on a 1950 record.

Trial Examiner Myers: On a 1950 record?

The Witness: Yes.

Trial Examiner Myers: What does that mean?

The Witness: This particular record is a large sheet with sufficient columns and spaces across it to record one year's record.

Trial Examiner Myers: I don't understand what you mean.

The Witness: On this record sheet at the top of each column there are sufficient spaces to show one year's record on a sheet of this nature.

Trial Examiner Myers: How often are the notations put in the record?

The Witness: It is our desire to have these made on a monthly basis, however, during overhaul periods of heavy work we have to necessarily give routine a secondary consideration and sometimes there is one or two months in running throughout the year that we do not have time to make the alarm checks.

Trial Examiner Myers: When do you think Newsom put Webb's name down, '50 or '51?

The Witness: I checked that record as of December 1950 and it wasn't there at that time, so it was sometime following the December date.

Trial Examiner Myers: And you discovered that in February?

The Witness: The very first part of February, at which time it is my job to check the record and make sure it is complete and up to date.

Trial Examiner Myers: You may proceed.

(Testimony of Harold L. Warden.)

Q. (By Mr. Luce): Was there any occasion when Newsom was [156] absent from his work without explanation? A. Yes.

Q. When was that?

A. It was during the month of October, 1949, if my memory is correct.

Q. What happened then?

A. It was following this discussion that I had with Newsom the first time in which I talked to him about his unsatisfactory nature of work. This occurred on a Thursday. The following Friday Mr. Newsom did not report to work and did not notify the company, to my knowledge. Saturday and Sunday were not worked, and Monday Mr. Newsom did not return to work. On my way home in the evening I stopped past Newsom's home and asked him what had been the trouble and what was wrong.

He said he had been sick and his wife had been sick and he had not come in. He did report for work the following Tuesday.

Trial Examiner Myers: Meaning the next day?

The Witness: Yes.

Q. (By Mr. Luce): At the time you were out there had he been in bed? A. No, sir.

Q. Did he give any appearance of illness?

Mr. O'Brien: I object to that.

Mr. Luce: I will withdraw it, but I think sometimes you [157] can tell very easily. Sometimes that is the way a doctor tells.

Q. (By Mr. Luce): Now, Mr. Warden, did you obtain the records that show the logs and other

(Testimony of Harold L. Warden.)

records which contain a diary of work done by Mr. Newsom?

A. I do not understand the question.

Q. You will have to tell me because I don't know what they are, but you have some records?

A. Yes, I have the records.

Q. Tell us what they are.

A. The records consist of routine records——

Trial Examiner Myers: He means the name.

The Witness: Routine records.

Q. (By Mr. Luce): You prepared a set of records to put in evidence here?

A. Yes, I have.

Q. Tell us what they are.

A. The records I have prepared are tests on unit turbines No. 1, No. 2 and No. 3 at Silver Gate and combustion checks made on Boilers No. 3, No. 4 and No. 5.

Q. Have you made copies of these records?

A. Yes.

Q. Photostatic copies? A. Yes.

Q. Will you produce them, please?

A. Yes. [158]

Q. I will now call your attention to a set of photostatic records and first I will ask you whether or not these are photostats of original records obtained from the San Diego Gas & Electric Company.

A. Yes, they are.

Q. Did you have the photostats made?

A. Yes.

Q. Will you tell us what these records are, page

(Testimony of Harold L. Warden.)

by page? First, tell us, generally, what they are, and then we will ask you later to point out what is shown on these records in respect to Mr. Newsom's work.

A. Page 1 is entitled S.G. Routine Jan. 51, which is a routine outline that was prepared and shown in the border are dates from January 15th through January 31st.

The numbers on this record are routine outlines indicating specific jobs to be done on the day so designated, if conditions are such that that job can be done. It is necessary to understand, again, that some of the routines that are necessary in our plant likewise have to be fit in into overall plant operations.

Q. I think I will change my order and ask you to state what in indicated on that page in respect to the work of Mr. Newsom.

A. Mr. Newsom indicated by check marks that Item No. 4 on the 19th of January, and Item No. 4 on the 26th of January had been completed. However, on a calorimeter record which [159] works in conjunction with this, he failed to indicate on that record that the work had been completed, leaving a question as to whether the work had been done or had not been done.

Item No. 9 pertains to alarms and that work had been started on the 15th and completed on the 23rd. However, no indication had been made that the work had been started on the 15th on the routine outline.

Item No. 10, which also pertains to the calorime-

(Testimony of Harold L. Warden.)

ter, you will note by a check mark that it had been started and likewise it had not been noted on the calorimeter record.

Q. Leaving the question was to whether or not it had been completed? A. That is correct.

Q. Now, page 2.

A. Page 2 is a copy of the instructions from our instruction book, whereas the Item Nos. 1, 2, 3 and 4, will correspond to the numbers on the No. 1 page. In other words, No. 1 is indicated on the No. 1 page under the heading "Weekly", which would mean, "drain control air filters."

Nos. 2 and 3, as noted at the bottom, were to be done by the regular man, and not by the routine man.

Item No. 4 is the calorimeter on the weekly basis and is so indicated on the routine sheet No. 1 as Item No. 4 on the date specified.

Q. Go ahead. [160]

A. Page No. 3 is similar to page No. 2, only that designates by number the items to be done on a monthly basis as so indicated by Sheet No. 1.

Q. These are taken from your order book, is that right?

A. It is taken from the instruction book and order book at Silver Gate, yes.

Q. These were instructions to Mr. Newsom or to all the instrument men?

A. To all the men, but particularly to Mr. Newsom because this is routine work.

Q. Now, you may proceed.

(Testimony of Harold L. Warden.)

A. Page No. 4 is Sheet 1 of Sheet 2 which is a test, a routine combustion test on our Boiler No. 5 at Silver Gate. These sheets are made up in form and supplied to the men to make these tests on.

Q. Point out a specific instance there in respect to Newsom's work.

A. On Sheet No. 4 there is no specific instance, however, Sheet No. 4, being one of two sheets for the completed tests, was included in the exhibit. The items near the bottom of the page——

Q. What page?

A. Page No. 5, ——entitled "Burner number, Registered Notches, open." Then "Burner number, Position, inches." That is repeated for all eight burners. Opposite that should be [161] given the information as to the registered and burner position of the boiler during which time this combustion check is being made.

It will be noted that only two figures appear in the test column, figure numbers 16 and 21. It shows no settings or proposed settings or anything for the remainder of the eight burners.

Q. Whose duty was it to make these entries?

A. It was Mr. Newsom's duty.

Trial Examiner Myers: Wasn't Fowler supposed to do it?

The Witness: Fowler was working on this job without my knowledge and this job does not require two men.

Trial Examiner Myers: Did you speak to Fowler about it?

The Witness: I have had no occasion.

(Testimony of Harold L. Warden.)

Trial Examiner Myers: He is supposed to be working with Newsom?

The Witness: He was not supposed to be on the job.

Trial Examiner Myers: Yes, sir, but he was on the job. Have you discussed it with him since you discovered this?

By the way, when did you discover these sheets?

The Witness: Following the routine work which was completed by Newsom from the 15th of January to the 31st of January.

Trial Examiner Myers: When did you discover this omission on page 5? [162]

The Witness: It was near the first part of February, the exact date I don't recall.

Trial Examiner Myers: And since that date you haven't spoken to Fowler about it?

The Witness: No, sir, I have not.

Trial Examiner Myers: Fowler was on the job?

The Witness: Yes, he was there.

Trial Examiner Myers: By the way, while we are at it, when did you discover the omissions on page 1 of this proposed exhibit, that is, the S.G. Routine of January?

The Witness: Are you referring to Item No. 4?

Trial Examiner Myers: Yes, everything on that sheet that you complained about.

The Witness: At about the same time I discovered these incomplete tests and specific examples—

Trial Examiner Myers: You discovered this all after your decision to terminate, transfer or allow Newsom to resign?

(Testimony of Harold L. Warden.)

The Witness: That is correct. However, if I might be permitted to add, these had been passed to me very near the dates which they show and I had made a quick analysis of them without going into complete details. After having made many of the tests myself, it is not necessary to scrutinize them in exact detail to determine a good job is not being done.

Trial Examiner Myers: Why did you go over these in February, then? [163]

The Witness: Because it is my job to correct these records in more detail as time allows.

Trial Examiner Myers: All right, go ahead, Judge.

Q. (By Mr. Luce): Take your page 6.

A. This is a copy of the tests performed on Boilers No. 3 and No. 4, a routine combustion check. The item of question on this test might be noted by the encircled area. This test was made with excess air on the boiler of 12 to 13. The instructions state that the test should be made with 19 per cent air, that is, on Boiler No. 3.

Boiler No. 4 was made with excess air of 21 per cent. There is the possibility and accepted procedure that plus or minus 2 per cent above the prescribed is acceptable.

Under the No. 4 boiler and circled portion, it shows that the number of burners present was four, but no registered or burner position is shown for that boiler.

On Boiler No. 3 the number of burners is shown

(Testimony of Harold L. Warden.)

as four, and the registered position was shown as 13, 14, 12 and 12; the burner position shown is 17 inches and the inconsistency of this test is evidenced.

Q. You may go to page 7.

A. Page 7 consists of a copy of the test run on turbine No. 1. This is a routine test which requires the services of two men because there are readings made both on the turbine floor and on the basement floor which is separated by a considerable [164] distance. However, Mr. Newsom does not show his assistant's name on this check.

The encircled portion, the psi, meaning pounds per square inch, and not been changed to read the proper pressure or terminology which is inches mercury and not pounds per square inch.

The other encircled area in the right hand column consists of two sets of numbers.

Trial Examiner Myers: What is psi 7.6?

The Witness: That is the terminology meaning pounds per square inch. However, under the operating conditions that the machine is operating at this time, it is impossible for it to be pounds pressure. It is inches vacuum measured in inches mercury.

Trial Examiner Myers: This psi 7.6 can be translated into inches of mercury?

The Witness: No, unless it is so designated. The proper designation should have been 7.6 inches of mercury.

Trial Examiner Myers: You are reading this. What does 7.6 mean? Would any supervisor now

(Testimony of Harold L. Warden.)

working with you understand what 7.6 meant on this?

The Witness: If it had been properly entitled 7.6——

Trial Examiner Myers: This psi is typed in?

The Witness: Yes.

Trial Examiner Myers: You have encircled it?

The Witness: Yes.

Trial Examiner Myers: Did he put down the right numerals for the psi?

The Witness: He did not. It is not reading in psi, it is reading in inches of mercury.

Trial Examiner Myers: Would that confuse you if you read it?

The Witness: Yes, it indicates to me the inaccuracy of the tests because if he neglects to change the title of the reading——

Trial Examiner Myers: What should it be?

The Witness: I am questioning the title which should have been changed to read inches mercury.

Trial Examiner Myers: All right, now. Instead of putting in inches mercury, he just put down what should be inches mercury without scratching out psi and putting in im?

The Witness: The designation for inches is two small marks, like quotation marks, and the initial Hg stands for mercury.

It is our practice on these tests that the titling in the side here, as you might note, for all the other stages of pressure psi is totally correct, because it is pressure, but not at the 18th stage, the stage I am

(Testimony of Harold L. Warden.)

talking about. The title of psi was incorrect and should have been crossed [166] out and so designated in inches mercury.

Q. (By Mr. Luce): Mr. Warden, as a matter of fact, that isn't correct to say psi 7.6? A. No.

Trial Examiner Myers: What Judge Luce asked you was, is it correct to say psi 7.6?

The Witness: It would be correct to say psi 7.6 if the machine was operating in a positive pressure.

Trial Examiner Myers: All right, suppose he put inches mercury. What, if anything, should have been down there?

The Witness: The same figures.

Trial Examiner Myers: 7.6?

The Witness: Yes, but there is considerable difference between 7.6 pounds and 7.6 inches mercury.

Trial Examiner Myers: I will agree with you, but to you, looking at this at the time you went around and inspected it, would somebody of your ability, or greater ability, be confused by seeing this and think there was something wrong with the boiler?

The Witness: We are talking about a turbine.

Trial Examiner Myers: Whatever it is.

The Witness: The reason that was circled was to further indicate the sloppy or inaccurate manner in which the tests were run by Newsom.

Trial Examiner Myers: Did he run the test wrong or [167] did he not make the correct notation there?

(Testimony of Harold L. Warden.)

The Witness: He did not make the correct notation for that specific item.

Trial Examiner Myers: All right, if you saw that test run, would you be confused by the fact that he didn't change it? Didn't change the letters psi to inches mercury?

The Witness: Inasmuch as he neglected that, I would doubt then the reading of 7.6, because the entries of a man making such a test as this would very likely raise a question as to whether or not the 7.6 pounds would be the correct reading at this particular time.

Trial Examiner Myers: When did you make this discovery?

The Witness: It was in February.

Trial Examiner Myers: And all this material that you have in this proposed exhibit was made in February of this year?

The Witness: Yes.

Trial Examiner Myers: I just don't want to ask you the same questions each time.

You may proceed.

The Witness: The figures encircled in the last column about two-thirds of the way down on the gauge are 266.5 and 96. If you will follow across the page to the left you will find there is no designation of what these readings would be. They mean nothing to me or to any of the other men that have observed these tests. [168]

I do not understand what the reading is or what they pertain to. This is just another example of the

(Testimony of Harold L. Warden.)

inconsistence and inaccurate work of Mr. Newsom.

Q. (By Mr. Luce): Mr. Warden, on the top of the sheets so far is the word "Observer Newt"?

A. Yes.

Q. What is that?

A. That is the manner in which he signed his tests as an abbreviation for Newsom.

Q. Take your next page, please.

A. This is Page No. 8 pertaining to the turbine tests on Unit No. 2 Turbine.

Again, the failure to designate the proper title of the reading on the 18th stage pressure.

Q. On the lower part of the page, what are those?

A. On the left-hand side the printed form shows "C.W. temperatures No. 1 and No. 2," and the "C.W. discharge pressure No. 1 and No. 2." However, the pressure on pumps No. 3 and No. 4 he did not properly title. Again, indicating the inaccurate manner in which he established his proper title.

In the right-hand column of this Page 8 there are some figures which are not completed readings. It is quite impossible, under the operating conditions that the turbine is operating to have a low pressure temperature of 279 degrees. Undoubtedly, in averaging out the readings and preparing them for a final, [169] he omitted the low pressure heater reading and transferred the Deaerator water and vapor temperatures which had not been carried clear across, raised one line, and placed in the average or final column, the figure of 279.

(Testimony of Harold L. Warden.)

Therefore, as far as I can see, there is no reading for the low pressure heater temperature which is a very important reading in calculating these tests. Likewise, to a person who wanted to pick up any specific readings from this, in the event he should choose one below where this omission had been made, if he moved right straight across the page, the one item which reads, "H.P. heater drain" would have a blank, making the test of little value.

Also, across from the reading, "Condensate flow" there is nothing as I have indicated by a small circle enclosing a question mark.

Trial Examiner Myers. And this was discovered sometime in February?

The Witness: Yes.

Q. (By Mr. Luce): The date of the test is shown at the top of the sheet, is it not?

A. Yes, it is shown as 1-16-51.

Q. You may go to Page 9.

A. Page 9 is a copy of the turbine tests run on No. 3 turbine and dated 1-16-51, Observer Newsom.

Again, omitting the proper titling on the C.W. temperatures [170] and the C.W. discharges which should be No. 5 and No. 6.

There is a complete omission of the discharge—the C.W. discharge pressure as indicated by the circle in the last column.

Q. And what about Page 10?

A. Page 10 is a photostat of a chart that was run at the time this test was taken on Unit No. 3. It will be noted, referring to Page 9, that the test

(Testimony of Harold L. Warden.)

was presumed to be run at 1:15, 1:25, 1:35 and 1:45. This time can be readily established on the turbine flow meter chart as indicated by the timing in the border. It will be noted that I made two marks on this chart indicating this period of time in which this test was run.

Reading this chart, it is graduated in 10's from 0 to 650. The width of the line is such that it covers approximately two divisions or 20. Where a fluctuating reading is evident, it is our practice to average the maximum and minimum readings. Therefore, a minimum reading of 510, and a maximum reading of 530, would give an average reading of 520. However, the reading as shown on Page 9 and so circled is 515, which is 5000 pounds of steam per hour error.

Q. What about Page 11?

Trial Examiner Myers: What figures average 520?

The Witness: On the chart as indicated by Page No. 10, which is a copy of the chart operation on the machine. It will [171] be noted in the left-hand lower side of this page that there is a time designated as noon, 1:00 and 2:00. The test was run in that period of time. The rate of flow was the reading in question and it is designated by the title on the chart very near to where we were reading. This chart is divided in divisions of 10 ranging from zero to 650. The heavy line indicated on the chart is the flow as recorded by the flow meter passing through the turbine during the time the test was made. This

(Testimony of Harold L. Warden.)

flow was an average of a reading of 510 and 531, the average of which, when considering each division is 10, would give you a reading of 520.

Trial Examiner Myers: After the 1:00 o'clock there, doesn't that drop below the 530 a little bit?

The Witness: It appears that the test was run from 1:15 to 1:45.

Trial Examiner Myers: Don't you see it going over there? In fact, it is almost down to 500.

The Witness: I don't understand you.

Trial Examiner Myers: Isn't it almost down there, doesn't it slide off? This is the line you mean? That is 500?

The Witness: Yes.

Trial Examiner Myers: Doesn't this line slope down?

The Witness: Very, very slightly, almost no more than it exceeds above or comes up to here.

Trial Examiner Myers: That is 2:00 o'clock.

The Witness: All right, let's take from here to here. During that period of time, I believe the line touches the 530 and goes, I believe, very, very slightly, if any, below the 10.

Trial Examiner Myers: It goes some and might have been his reason to say it was 515 instead of 520.

I don't know what his explanation of that would be, but go ahead.

Q. (By Mr. Luce): Well, now take up page 11.

A. Page 11 is a photostat of the 1950 alarm record. That is one page of a two-page record.

(Testimony of Harold L. Warden.)

Page 12 is the——

Trial Examiner Myers: Was anything wrong with that?

The Witness: No, nothing wrong with that.

Trial Examiner Myers: Did you put it in here for some reason?

The Witness: That is used to be able to show a completed record. The same as on the combustion check record on No. 5, there were two pages there.

Trial Examiner Myers: What did you say pages 11 and 12 were?

The Witness: It is the alarm setting record. Page 11 is Unit 1, alarm record setting for the year 1950.

Trial Examiner Myers: This is supposed to cover Mr. Newsom's work? [173]

The Witness: Yes. Page 12 is the record of the alarm setting on Unit No. 2, 1950. These two pages are compiled to show the alarm records for both Unit No. 1 and Unit No. 2 for 1950.

On the last column on page 12 you will see an entry dated 1-23-51; a '51 record being applied to a 1950 completed record.

Below that in very fine detail you will see the letters W-e-b-b.

Trial Examiner Myers: Where is that?

The Witness: At the top of the column.

Trial Examiner Myers: That is where he put Webb's name?

The Witness: Yes.

Trial Examiner Myers: I see what you mean, go ahead.

(Testimony of Harold L. Warden.)

The Witness: A 1951 record was applied to a 1950 record and these entries have been questioned.

Q. (By Mr. Luce): Now that represents the incident that you mentioned to show to Newsom and he attempted to erase, is that correct.

A. That is correct.

Q. Now, go to page 13.

A. Page 13 is a monthly recording of the calorimeter calibrations at Station Silver Gate. It is so entitled for the month of January, 1951.

The instructions are that when an item is checked it is [174] to be marked as indicated in the lower right-hand side "Use these marks to check above." "O" representing boiler room operator, "V" indicating instrument engineer, "T," instrument technician, and "X," others.

It will be noted Newsom marked on page No. 1, Item No. 4, on the corresponding dates that he had checked this on a weekly basis. However, as shown by the circle drawn on this there was no notation in any manner made of that work being done, which consisted of the mechanical balance and the ordinary weekly maintenance which is described in the lower left-hand corner.

Also, Item No. 12 on Sheet 1 was indicated as having been completed and yet no notation was made on this record as indicated by the circle in the column of the 29th.

Trial Examiner Myers: When you say sheet No. 4, what do you mean?

(Testimony of Harold L. Warden.)

The Witness: Page No. 4.

Trial Examiner Myers: You undoubtedly wrote this notation, "This work shown as done on work sheet, see No. 4?"

The Witness: Yes, that is my writing.

No. 4, the work sheet, as we call it, is the No. 1 page of this one here.

Mr. Luce: We have been referring to it as Page 1.

Trial Examiner Myers: Page 1 of this proposed exhibit?

The Witness: Yes. [175]

Mr. Luce: Please refer to these as pages because you have Sheet 1 and Sheet 2 and it is confusing.

The Witness: I have been referring to the page numbers, but the question was brought up in regard to the notation here "Work sheet". This Page No. 1 is commonly called among us a work sheet.

Trial Examiner Myers: All right, go ahead.

What is the meaning of the notation "See No. 10"?

The Witness: No. 10 refers to Item No. 10 on Page No. 1. In other words, Item No. 10 on Page No. 1 was marked as indicated that it had been done, and still no indication of this work having been done on Page 13, the calorimeter record.

This leaves a doubt as to whether the work was done or was not done, whether this was marked off on Page No. 1 and the work was not done, whether the work was done and an omission made from Page 13, or what is the status of the work.

(Testimony of Harold L. Warden.)

It is an indication of the inaccuracies and incomplete work that was produced by Mr. Newsom.

Trial Examiner Myers: This was discovered in February?

The Witness: Yes, sometime in February.

Q. (By Mr. Luce): Now, refer to Page 14.

A. Page 14 is an alarm setting record for 1951, showing entries made date 1-15-51. This ties in with the points on Page No. 1, or question on Page No. 1, Item No. 8 where I had noted this item was started on 1-15-51 and not so indicated on the work sheet.

It is necessary when we make up the work sheet for the next month that we so place our work so that it is consistent on as near a basis as possible. Therefore, if I had not noted this and had set up the alarm checks for the 23rd of February, needless to say the alarms on Unit No. 1 would have gone approximately one week longer without being checked on that unit.

Q. What is Page 15?

A. Page 15 is an alarm record for 1951 on Unit No. 2. There were some omissions that might be noted in the complete check of the alarm, however, no notation had been made on the work sheet that the alarms had not been completely checked.

Q. Now, your last page.

A. That is the page I have been referring to.

Q. Mr. Warden, the proposed exhibit from which you have been testifying, is that a checked

(Testimony of Harold L. Warden.)

photostatic copy made from records of the company? A. Yes, I believe so. [177]

Mr. Luce: We offer this exhibit in evidence.

Trial Examiner Myers: Any objections?

Mr. O'Brien: I have two objections.

* * * * *

Trial Examiner Myers: I will overrule the objection and receive the paper in evidence. Will the reporter please mark this Respondent's Exhibit No. 2.

(Whereupon the document above referred to was marked Respondent's Exhibit No. 2 and was received in evidence.)

[Printer's Note: Photostatic copies of Respondent's Exhibit No. 2 are reproduced at pages 441 to 455 of this this printed record.]

Trial Examiner Myers: We will take a short recess.

(Short recess.)

Trial Examiner Myers: Mr. Warden, will you resume the [178] witness stand.

Judge Luce, you may proceed.

Q. (By Mr. Luce): Let me ask you again, just briefly, about these prior meetings with Mr. Newsom at which time you discussed with him the quality of his work.

The first one, I believe you said, was October 27, 1949.

A. I believe that is correct.

(Testimony of Harold L. Warden.)

Q. At that time you pointed out to him the reasons why you said his work was not satisfactory?

A. Yes, I did.

Q. You have already testified as to these reasons? A. Yes.

Q. Then, again, you discussed with him the quality of his work on May 16, 1950? A. Yes.

Q. At that time Mr. Hardway was present?

A. Yes.

Q. Did you again point out the reasons why his work was not satisfactory? A. Yes.

Q. What was his reply?

A. That he liked instrument work.

Q. Now then, on September 18, 1950, you had a conversation with him in the presence of Mr. Kalins, did you not? A. That is correct. [179]

Q. Now, at that time did Mr. Kalins tell Mr. Newsom about his work? Did he criticize Mr. Newsom's work? A. Yes.

Q. Did he go into detail?

A. To some extent, yes.

Q. What did Mr. Newsom say at that time?

A. I don't recall his concluding statements.

Q. That is the conversation in which Mr. Kalins told him if his work didn't improve he would be terminated?

Mr. O'Brien: I am going to have to object. I am not sure that is the testimony.

Mr. Luce: I will withdraw the question.

Q. (By Mr. Luce): Will you tell us what occurred in the meeting with Mr. Newsom on or about September 18, 1950?

(Testimony of Harold L. Warden.)

A. Mr. Kalins, Newsom and myself met in my office at Silver Gate, at which time Mr. Kalins told Newsom that his work had not been satisfactory, and he cited some instances as examples of unsatisfactory work.

During the course of the conversation, Mr. Kalins stated that if his work did not improve satisfactorily and come up to a set standard that he no longer would be allowed to remain in the instrument crew.

Trial Examiner Myers: When was this meeting?

The Witness: September, 1950.

Mr. Newsom asked, I believe two times, just what that meant. [180] My answer to Newsom was that he would be through, out. That he could no longer work in the instrument department.

Q. Did you have any further discussion with him at that time after those remarks were made?

A. I believe there was continued discussion of the matter, which I do not remember at this time.

Trial Examiner Myers: Am I right in assuming that you are the head of the instrument department?

The Witness: That is correct.

Trial Examiner Myers: And was during all the time we are discussing?

The Witness: Yes.

Q. (By Mr. Luce): Mr. Warden, after this discussion with Mr. Newsom on September 18, 1950, what was the nature of your work from that time on until about the first of January?

(Testimony of Harold L. Warden.)

A. I was required to spend practically all my time on extensive tests on the No. 5 Boiler which had been installed in August prior thereto.

These tests were run in connection with the boiler manufacturer, the instrument manufacturer and burner manufacturer, together with the engineer from the company's engineering firm that designed and built this unit. The nature of the tests was such that it was to the company's advantage to have the persons most familiar with instrumentation on the scene during these tests so that a more full [181] and complete test might be obtained.

Q. Were you able during that period of time to pay attention to the activities of Mr. Newsom?

A. Not to any great extent.

* * * * *

Cross Examination

Q. (By Mr. O'Brien): Mr. Warden, how long have you held your present position?

A. As instrument engineer?

Q. Yes.

A. Since March, 1947.

Q. And prior to that your position was what?

A. Instrument technician A.

Q. You held that position for approximately what length of time?

A. For a period of about eight months. And prior to that I was instrument technician, senior, which position I held from June 1944.

Q. That means that you have been working, at least at Station B, since June 1944?

(Testimony of Harold L. Warden.)

A. That is correct.

Q. When was Silver Gate put in operation?

A. 1943. [182]

Q. Did you work at both stations?

A. I did.

* * * * *

Q. That is, there has been no serious injury since 1944?

A. I know of none or cannot remember.

Q. You would know of one if there had been any? A. Probably.

Q. Isn't that due, in some part, to the efficiency of the instrument technicians?

* * * * *

The Witness: I believe that might have played a part, however, I believe the reason of the excellent safety record throughout our time is brought about by the constant vigilance [183] of those working around this type of equipment.

Q. (By Mr. O'Brien): That includes the instrument technicians, too?

A. That includes the instrument technicians.

Q. Since Mr. Newsom came into the department, has there been any serious injury to any of the equipment? A. Yes.

Q. Would you name one, sir?

A. The burn up of Unit No. 1 generator.

Q. That was the No. 1 generator which burned up in September of 1950? A. That is correct.

Q. That is the only serious injury to equipment?

A. That is right. We have had difficulties result-

(Testimony of Harold L. Warden.)

ing in some damages to Boiler No. 5 which was brought about by the original installation fallacies.

Q. That is, the injury to Boiler No. 5 was due to persons who were not employees of the San Diego Gas & Electric Company, is that right?

A. Yes.

Q. That is, it was not properly installed when it was given over to your care?

A. That is correct.

Q. Then, the only serious injury to the equipment has been this burn up of—is it a generator?

A. It was a generator field coil that burned out.

Q. Was that due to human negligence?

A. I don't have a full report on it.

Q. You don't know what caused it?

A. I have not had the opportunity to read the report of what caused that burn up.

* * * *

Q. Do you yourself have an opinion?

A. Yes.

Q. What is it?

A. Failure of insulation between the windings.

Q. In other words, you think it was a manufacturing defect?

A. It was a materials defect. [185]

* * * * *

Q. By the way, do you have an instrument technician working under you by the name of Bob Cole?

A. Bob Cole worked as an instrument technician, however, I believe his rate while working

(Testimony of Harold L. Warden.)

for us was junior engineer. While working for us it was for training purposes.

Q. Is it right that he has a more responsible position with the company now? A. Yes.

Q. Do you remember an occasion when Mr. Cole opened the valve permitting steam to a line on which Mr. Armstrong was working?

A. I recall the occasion, however, I do not believe Mr. Cole was to blame for that, because he had asked for a holdout which had not been properly executed for him.

Q. Mr. Cole had not checked to make sure that nobody was working on the line before he turned the steam into it?

A. He had no reason to. [188]

Q. That could have resulted in serious injury to Mr. Armstrong?

A. Yes, due to the fact of the holdout not being properly executed. However, no serious injury occurred and no damage to the equipment.

Q. With all these derelictions of Mr. Newsom's, no injury occurred, did there?

A. Due to his responsibility?

Q. Due to the actions of Mr. Newsom there was no injury to any persons? A. No, sir.

Q. No damage to any equipment by Mr. Newsom?

A. No damage of major proportion to any equipment.

Q. Any minor damage?

A. On unit No. 1, during the overhaul on which

(Testimony of Harold L. Warden.)

Mr. Newsom had been assigned the responsibility, there were some pyrotron motors that were changed because they were thought to be inoperative. In so doing the design of the new motor required redrilling the case, making the original motors of no value.

I don't know whether you could consider that damage to equipment or not.

Q. These motors were damaged, weren't they?

A. They were.

Q. They were made of no value to you? [189]

A. That is right.

Q. They were made of no value to you by Mr. Shroble and Mr. Fowler?

A. I don't know who was exactly responsible for that. The man who had been assigned the responsibility of the overhaul.

Q. Did you inquire who was responsible?

A. Yes.

Q. Of whom did you inquire?

A. Of Mr. Newsom.

Q. What did Mr. Newsom tell you?

A. He told me that Fowler had been working on the pyrotrons.

Q. Did you make inquiry of Mr. Shroble?

A. Yes.

Q. What did Mr. Shroble say?

A. He said he thought the pyrotron was inoperative and he had checked to the best of his ability with Newsom on these and they decided to change the motor.

(Testimony of Harold L. Warden.)

Q. Who actually turned the juice into the motors and burned them out?

A. They were not burned out, they were changed because they were thought to be inoperative.

Q. Were they inoperative?

A. They have since been tested and found in an operative condition.

Trial Examiner Myers: Inoperative? [190]

The Witness: No.

Q. (By Mr. O'Brien): Now, you are saying there wasn't any damage to the motors?

A. No, because the motor can not be used because of the change of the new motor which replaced it. I qualified my statement that I didn't know whether it could be considered damage to equipment, sir.

Q. Do you recall of any incident again involving Mr. Cole with reference to No. 2 turbine steam flow meter when he was blowing down the meter?

A. That strikes a point in my memory, but I don't recall the incident or detail.

Q. The object of blowing down the meter is to keep the steam lines clean to the meter itself, is that right? A. Yes.

Q. Before blowing down the meter two valves are closed to bypass the steam from the meter itself, is that right? A. No, sir.

Q. What valves are opened and what valves are closed when the meter is blown out?

A. During the blowing down period the valves on the lines which we term K-1 and K-2 are closed,

(Testimony of Harold L. Warden.)

and the equalizing valve on the meter is opened.

After the K-1 and K-2 valves are closed, then blowdown valves are opened and the lines blown either to atmosphere or [191] to the blowdown system.

Q. What would happen in the event the K-1 and K-2 valves were left open and the blowdown valve was open?

A. It would cause the meter to go to its maximum stop.

Q. Its maximum stop being——

A. The stop manufactured in the meter so it can not over travel.

Q. It is kind of a lead seal on there?

A. No, sir.

Q. What is it?

A. It is a design of the instrument in the upper cover so that when the bell comes up to its maximum limit, it covers the K-2 port.

Q. That is a mercury meter?

A. That is correct.

Q. Approximately how much mercury is contained in the meter?

A. I don't have that figure available.

Q. About 50 pounds?

A. I would say that much, possibly more.

Q. What steam pressure does the meter register? A. 850 pounds.

Q. Is it possible that the safety factor on that meter might blow and the meter be driven into the

(Testimony of Harold L. Warden.)

steam line if the blowdown valves were open when K-1 and K-2 valves were still open? [192]

A. It is extremely unlikely that that could happen.

Q. It would be negligence, however, to leave K-1 and K-2 open in blowing out the meter?

A. It is not good practice.

Q. Now, do you recall that Mr. Cole did that on one occasion?

A. Yes, I believe that is correct. [193]

* * * * *

Q. By the way, how many gauges do you have at both stations? They run into the thousands, don't they?

A. Yes, I believe it would probably be 750 to possibly 1000 gauges.

Q. Some of these require very little attention?

A. Some of them are of varied importance, yes.

Q. Quite recently did you have a fuel oil spill at Silver Gate? A. Yes, we did.

Q. When was that?

A. During Unit 2 overhaul on Boiler No. 3 of this year.

Q. It was after Mr. Newsom's discharge?

A. Yes, it was.

Q. Was that due to human negligence?

A. That was due to another time in which a proper holdout [194] had not been executed.

Q. Was one of the instrument technicians involved in that?

A. There were two instrument technicians involved in that.

(Testimony of Harold L. Warden.)

Q. Was anyone discharged?

A. No, they were not.

Q. Approximately how much oil escaped?

A. The condition in which that oil splattered I wouldn't be able to make an estimate, sir.

Q. That is, fuel oil was flowing at high pressure all over the place?

A. Over an area below the operating floor, directly under Boiler No. 3.

Q. Creating a serious fire hazard?

A. Say a questionable fire hazard because the unit was not on the line and we had not been using it throughout the plant because gas was available and the temperature of the oil was quite low.

Q. With reference to this boiler, on which Mr. Newsom missed a control that you caught, were there any other instrument technicians around at the time when you called it to his attention?

A. I believe there were. I don't consider his check on the boiler very thorough because of the airflow mechanism being locked in place and the pyrotron and temperature recorders were not all operating. [195]

Q. Would a fireman be able to start up the boiler with the mechanism locked the way that was?

A. He would have been able to start it up, but he would not have been able to continue the entire warmup period with the airflow meter out of service, and particularly, the pyrotron.

Q. It wouldn't be possible for the fireman to do any serious damage?

(Testimony of Harold L. Warden.)

A. He would not, because he would not have an indication as to what his boiler was doing and he would have stopped it at that point.

Q. Aren't there occasions when you have caught omissions by other instrument technicians?

A. Yes.

Q. But Mr. Newsom was the only one who was discharged, as far as you know?

A. If I may be permitted to make this statement——

Q. Go right ahead.

A. I don't feel we can compare the omissions by Shroble and Fowler with Newsom's because of the fact that Shroble and Fowler still lack some two or two and one-half years' experience as compared to Mr. Newsom.

Q. What you are saying is that you are holding Mr. Newsom to a much higher standard of work than the other instrument technicians?

A. Due to his rating, yes. [196]

Q. When was it that you told Mr. Newsom that he would be in charge of the overhaul of Unit No. 1?

A. It was at the very beginning of Unit No. 1 overhaul.

Q. It was during the month of September?

A. I don't remember the exact date.

Q. You have already fixed the date of the conference with Mr. Kalins and Mr. Newsom as of September 18th? A. Yes.

Q. With reference to September 18th, when did

(Testimony of Harold L. Warden.)

you tell Mr. Newsom he would be in charge of the overhaul?

A. It was before September 18th.

Q. How long before?

A. If my memory is correct, I believe we started the Unit 1 overhaul on September 6th or thereabouts.

Q. How did you fix that date?

A. Because we started the overhaul very shortly after the burnup or after the burnup time. That day could very definitely be established, however.

Q. Is there a daily log maintained of the work at each station? A. Yes.

Q. The daily log would show on which date he started that?

A. I am sure it would indicate the beginning of the overhaul at Unit 1, yes.

Q. During recess would it be possible for you to call your [197] office and examine that log then tell us this afternoon when Mr. Newsom started the overhaul?

A. Yes, I can secure that information for you.

Q. By the way, are the log sheets kept in a bound volume so it would be convenient for all of us to examine them?

A. The log sheets are made up in a weekly manner on looseleaf binder material and submitted to my department head, Mr. Kalins. From there they go to the superintendent who checks them and then they are filed in a looseleaf folder. However, I keep

(Testimony of Harold L. Warden.)

a bound diary, so to speak, of the things that go into the weekly log that I present to Mr. Kalins.

Q. The instrument technicians give you the data which you yourself enter onto the log?

A. Yes.

Q. So the log is your record of the work that your subordinates have done?

A. That is correct.

* * * * *

Q. After you make up your log, what do you do with your original notes that are handed to you?

A. In some instances they are filed and in other instances—the manner in which they are handed to me, they are on random [198] slips of paper and usually they are destroyed.

Q. That is, a man may be working with a wrench in one hand and a pencil in the other?

A. It isn't quite that bad, but out in the plant when they are working it is difficult for them to have an 8½ by 11 sheet of paper with them. Therefore, they just jot down their activities on most any kind of paper that is available to them. That is an exception, they usually present it in a decent form.

Q. That's right, they take their original notes and put it on a clean sheet so that it will be easier for you? A. That is right.

Q. Ordinarily, if you see an omission or something that you don't understand on these rough sheets, you ask the man about it before you write it up in your log?

A. If there is anything that attracts my at-

(Testimony of Harold L. Warden.)

tention at that time. As far as any error or question as to some specific item mentioned, I would perhaps contact the man if I didn't understand his log.

Q. You make up a daily log and turn it in every week?

A. On a weekly basis, yes.

Q. Mr. Newsom was engaged in the overhaul of this No. 1 at Silver Gate, you say, practically without supervision?

A. Very nearly so, yes. I did have the opportunity to check with him on occasions, usually in the mornings, as to the progress of the work he had done and if there were any [199] particular questions involved on the overhaul schedule.

Q. From about September 6th to, I believe you said it was about January 1st—right after New Year's Day that the work was completed?

A. The work was completed on Unit 1?

Q. Yes. A. Yes, that is correct.

Q. That was when you told him he would be in charge of routine at both stations?

A. That is correct, following that.

Q. In your conference with Mr. Newsom on September 18th, did you mention to him anything about the way he was handling the overhaul on Unit 1?

A. Unit 1 overhaul had not progressed far enough to be able to make much of an analysis at that time.

Q. So there was no criticism about how he was handling the overhaul?

(Testimony of Harold L. Warden.)

A. At that time no observations had been made warranting any criticism.

Q. The next time you talked to him about his work was in January, 1951?

A. The next occasion that we spoke of Mr. Newsom in regard to the work was at the meeting where Mr. Kalins and myself and Newsom were there at which time he was told of his discharge.

Q. So during all the time that he was handling this overhaul [200] at Silver Gate, practically without supervision, you didn't convey any complaint to him?

A. Except near the end of Unit 1 overhaul at which time the airflow incident and the pyrotron temperature recorders were brought open at which time I questioned his type of work there.

Q. That was a single incident, these two items?

A. They were both found the same day, but at separate times.

Q. You think there were other instrument technicians around at this same time?

A. They were all working in and around the instrument board, some of them, I don't recall who was there.

Q. How long did it take to correct the difficulty?

A. I didn't correct it, I pointed out the trouble. I forget which instrument man went in and freed the airflow. I do not recall, but there were two or three of us working on the pyrotron and corrected that difficulty.

Q. Mr. Warden, you have used the words "defi-

(Testimony of Harold L. Warden.)

nite measured output" in your testimony. I would like to know what you mean by these words?

A. What I am saying when I make the remark definite measured output is that Mr. Newsom's abilities indicated at times that he was capable of doing a far greater amount of work and a better nature of work than he was doing. It appeared to me a definite hesitation or a measuring of his output in mind with the required specific requirements of that particular job. [201] It was like he was trying to balance himself in that he did nothing more than what his specific job was required of him. That would be my analogy or reason for using the words of definite measured output.

Q. What you are saying is that you weren't satisfied with the work and you couldn't put your finger on what it was?

A. That is only one of the failings that he was notified of at the time of his discharge.

Q. That is the one item I am interested in now, the definite measured output. Do you have a production quota for instrument technicians?

A. That isn't very practical in our department.

Q. I couldn't understand how it would be.

How did you determine what his output should be?

A. It might be explained in his attitude towards his work. He did not show his desires to do anything except which was specifically instructed of him. The other men in the department, and I think not only in my department, but throughout

(Testimony of Harold L. Warden.)

the entire plant, are given certain leeways. We are not regimented down to the point that we can only move when we are told. That might be done in other companies, but if we see a gauge that is loose or improperly mounted, we can go ahead and straighten it up and we don't wait until we are specifically instructed to do this or that or something of that nature when it is obvious of the condition existing.

Also, some of the men who are working for me will notice other occasions of work out in the plant and they have been very fine in coming to me and saying that such and such appears to be needing attention. They call my attention to it and we proceed from there as a co-operating group, working in harmony.

Q. Isn't it a fact that Mr. Newsom has devised a more efficient method of doing certain routine jobs around the place?

A. I don't recall of any.

Q. You don't recall of any improvement that he suggested to do which you have adopted?

A. Undoubtedly, in his two and one-half years' time he has made considered suggestions. As I said, there were periods of time in which he did do very satisfactory work.

Q. Other phrases you used were "utter disrespect." What do you mean by that?

A. The manner in which he spoke to Mr. Kalins and I during our discussion with him in regard to his work habits of the September 18th meeting and, again, at the time of his discharge.

(Testimony of Harold L. Warden.)

Q. On both of these occasions you were reprimanding Mr. Newsom?

A. One he was being reprimanded, the other he was discharged.

Q. Would the better attitude have been, "Yes, sir, I will try to do better"?

A. No, that would not have been the proper attitude.

Q. He defended himself, didn't he? [203]

A. He did not accept criticism as it was given to him for his improvement and betterment.

Q. Well, this "utter disrespect," means just a feeling that you got rather than anything else. It was not anything he said, specifically, or just a feeling that you had?

A. It was the manner in which he spoke to us and the manner in which he said his demands and offered his questions.

Q. With reference to the supervisors' meeting, when the unanimous decision was made to discharge Mr. Newsom, I think you said you proposed at that time a training program?

A. That is correct.

Q. Was that the first time you proposed such a training program?

A. To the supervision in an official manner. There had been some conversation between the Station Chiefs, Mr. Kalins and myself in formulating a proposal, but at that particular meeting we put the proposal up to be decided on.

Q. These meetings were held weekly?

(Testimony of Harold L. Warden.)

A. I believe that is the attempt.

Q. Is there any formal agenda?

A. I don't know.

Q. Any minutes?

A. I don't know, I don't believe there is.

Trial Examiner Myers: You attend these meetings, do you? [204]

The Witness: I only attend these meetings occasionally. The primary attendants of these meetings are Mr. Hathaway, Mr. Zitlaw and Mr. Campbell. I don't know how often Mr. Kalins attends those meetings. I attend the meetings which pertain to or have some question in regard to instrumentation.

Trial Examiner Myers: How did you know there was going to be something discussed in regard to your division? Were you so advised or did you bring up the question?

The Witness: It can be done either way.

Trial Examiner Myers: How is it done?

The Witness: It is done in this manner, that either Hathaway, Campbell or Zitlaw will ask us to attend a meeting at which they might discuss an operation going into process, or might be scheduled for the next day or the following week, in which instrumentation will be discussed regarding operating problems or the like.

In the event I have something to present to these men in regard to instrumentation, I can make my wants known that I would like to come to the meeting and present such and such information.

(Testimony of Harold L. Warden.)

Q. (By Mr. O'Brien): You are not automatically invited to these meetings?

A. That is correct.

Q. If Mr. Hathaway wants you there he says please be there? A. That is correct.

Q. Suppose you want to take something up at a supervisors' meeting. You will tell Mr. Kalins, it goes through military channels and eventually word comes back to you that you are invited?

A. That is correct.

Q. How did you get invited to this meeting on January 30th, 1951?

A. Before this particular meeting I had talked to Mr. Kalins in regard to the proposed instrument training program. We went to the meeting together to present the proposed training program. I went as Mr. Kalins' assistant, because he is the head of the entire department and was the one to make the presentation of the proposal.

Q. When did you first discuss the instrument training program with Mr. Kalins?

A. Probably intermittently, when an occasional opportunity was involved, for a period of three or four months. Also, there had been discussions in regard to instrument training even as far back as when Mr. Hardway was efficiency engineer.

Q. It was an idea that was always in the back of your mind?

A. Yes, that at my first convenience I wanted to outline the program and put it into operation.

Q. Did you have your ideas formulated in writing by the time of the January meeting?

(Testimony of Harold L. Warden.)

A. No, they were in the form of notes, but it wasn't complete. There were no papers presented.

Q. When did you prepare the notes?

A. That was an accumulation of notes over some period of time.

Q. Months or possibly years?

A. I would say months.

Q. Why did you decide to take it up at this particular meeting?

A. Because we had completed the overhaul schedule for 1950, even though the overhaul schedule did extend into the very early part of '51, in January, we completed that overhaul schedule and we had approximately the months of February, March and April in which we could conduct this training program without being interfered with by overhaul programs.

However, I believe our overhaul program did start in March and not in April.

Q. And your proposal for the training program, as you presented it to the supervisors, did it then include the proposal that the instrument technicians receive their training after their regular working hours with overtime pay?

A. It was decided at this meeting that the training program would be attempted on the schedule of twice a week, one hour—between the hours of 3:00 and 5:00 in the afternoon. Our normal quitting time is 4:00 o'clock, therefore, it would be one hour on regular time and one hour at time and one-half for each meeting.

(Testimony of Harold L. Warden.)

Q. Was one of the considerations for that the fact that it would be a method of giving the instrument technicians a little more compensation?

A. No, sir.

Q. It had that effect, however?

A. It did give them more money, yes, but the reason——

Q. When was the program put into effect?

A. Shortly after the 1st of February.

Q. This supervisors' meeting was on what date, sir? A. January 30th.

Q. Who first brought Mr. Newsom's name into the discussion? A. I did.

Q. What did you say?

A. I was answering a question presented by Mr. Hathaway to me. The question was: "How are the men doing in the department or in the instrument crew?" My reply to Mr. Hathaway was, "All the men are doing very well, considering their training and experience, except Newsom."

Q. What was the next remark made?

I know it is very difficult at this late time to remember, but I know you have reviewed this with the Judge and you have been over it on the stand before, but I want it as well as you can possibly give it to us in the sequence of who spoke first and second so we can have it chronologically. Then we can see what it sounded like.

A. To the best of my ability I will do that.

Mr. Hathaway said, in effect, these may not be

(Testimony of Harold L. Warden.)

his exact words, but the statement was, "What should we do about this man?"

Who spoke next in turn, I do not know, but I do remember——

Trial Examiner Myers: Who was the conversation between? You and Mr. Hathaway?

The Witness: Mr. Hathaway directed his question as to what to do with this man to all persons attending the meeting.

Trial Examiner Myers: You brought up the question and Mr. Hathaway threw it open to the meeting.

The Witness: That is correct.

Mr. Campbell, Mr. Zitlaw, Mr. Kalins and myself, with Mr. Hathaway entered into discussing the work habits.

Q. (By Mr. O'Brien): You see, that is what has been giving me trouble before. Just tell us the conversation.

A. I just don't remember the exact sequence of who spoke and what it was at that particular time. Mr. Campbell was asked—perhaps this might be the solution to your question: When this unanimous decision was made, Mr. Campbell, Mr. Zitlaw, Mr. Kalins and myself were asked, individually, by Mr. Hathaway, one at a time, and I believe in that sequence, what we would recommend doing in regard to Newsom.

In each instance, the men answered that termination of employment seemed to be the only solution.

Trial Examiner Myers: Supposing Mr. Newsom

(Testimony of Harold L. Warden.)

was transferred to another department. What department would he be eligible to transfer into?

The Witness: That I couldn't answer. Undoubtedly, it would be in an engineering capacity because of his training.

Trial Examiner Myers: He was given an offer to be transferred to some other department?

The Witness: Yes.

Trial Examiner Myers: You had a meeting on January 30th?

The Witness: Yes.

Trial Examiner Myers: There were four or five men there, heads of departments?

The Witness: Yes.

Trial Examiner Myers: Would he be eligible or could he apply to any one of these five men's department? Could Newsom apply to any of these men?

The Witness: Yes.

Trial Examiner Myers: Then, he could be taken out of your department and sent to any one of these five?

The Witness: Yes, to any other department if he had made his transfer wishes known. They certainly would have considered it as proven by many other cases in our company where men have not been satisfied in one particular department or one type of work, have been transferred to other departments and have made very good successes of themselves. [210]

(Testimony of Harold L. Warden.)

Trial Examiner Myers: But these men had decided to get rid of him entirely?

The Witness: No, termination of employment in our particular department.

Q. (By Mr. O'Brien): Was anything discussed at this meeting other than the training program and the discharge of Newsom?

A. During the time I was there that was the content of the discussion. I don't know whether the meeting concluded afterwards or not.

Q. What did Mr. Hathaway have to say about his talk with Mr. Jewett, again? I don't know what Mr. Hathaway told you at that meeting.

A. Mr. Hathaway didn't tell me specifically, he was telling the entire group present, that he had had earlier an opportunity to talk with Mr. Jewett at which time he had told Mr. Jewett that one of the men who were making application for union representation was under a cloud or under a shadow because he was not doing satisfactory work.

Mr. Jewett's reply as stated by Mr. Hathaway was, "You have an employee that is not doing satisfactory work. You are not required to keep him and that his discharge would have no effect—that his discharge, removal or termination of employment, would have no effect on the union's negotiations with the men."

Q. So, if I get this sequence correct, the company gets a copy of the letter from these instrument technicians. After they receive that Mr. Hath-

(Testimony of Harold L. Warden.)

away talks to Mr. Jewett? It would have to be that way.

A. I don't know. I don't know the date and Mr. Hathaway did not specify the date on which he talked to Mr. Jewett.

Trial Examiner Myers: Did Mr. Hathaway know that anybody was applying for permission or desiring to have the I.B.E.W. represent the technicians prior to the receipt of this letter?

The Witness: Mr. Hathaway, to my knowledge, had not been informed of any activity by the men in their desire to join the union.

Mr. Luce: May I interrupt? I object to this line of questioning because it is calling for the conclusion of the witness and Mr. Hathaway is the best one to say.

Trial Examiner Myers: Was there any discussion about any representation of the I.B.E.W. prior to the meeting of January 15th and prior to the receipt by the company of the letter of designation of January 15th?

The Witness: I know of no information on that nature.

Trial Examiner Myers: As far as you know?

The Witness: Yes.

Trial Examiner Myers: Did Mr. Hathaway say anything to you about any other instrument technicians wanting to be represented by the I.B.E.W. before January 15th of this year?

The Witness: No, he did not. [212]

Mr. O'Brien: I don't know whether the objec-

(Testimony of Harold L. Warden.)

tion was sustained, so I will try it again with roughly the same question.

Q. (By Mr. O'Brien): Did Mr. Hathaway tell you that he had told Mr. Jewett that the man under a cloud was interested in the I.B.E.W.?

A. Yes.

Q. One more thing, you say Mr. Hathaway asked the group assembled there what should be done about Mr. Newsom, is that right?

A. That is correct.

Q. Who first suggested that Mr. Newsom be discharged?

A. I don't know who was the first that made the suggestion.

Q. Wasn't it in Mr. Hathaway's question itself, "What would you think about letting Mr. Newsom go?"

A. No, as I remember his words quite distinctly, "What should we do about this man?" He did not infer to his statement, to my interpretation, any reference that the man be discharged or terminated at that particular time. He asked it as a general question of what shall we do with this man.

Q. Mr. Hathaway didn't tell you why he talked to Mr. Jewett about this problem? A. No.

Q. Anyway, you didn't make the first suggestion that Mr. Newsom be discharged? [213]

A. No, sir.

Trial Examiner Myers: While you are going over your notes, I want to ask the witness a question.

(Testimony of Harold L. Warden.)

Did Mr. Hathaway at any time this year have any people in his department who were under a contract that the company had with the I.B.E.W.?

The Witness: Yes, the largest portion of the men working for Mr. Hathaway were working under the contract of the I.B.E.W.

Mr. O'Brien: That was a point I was coming to, Mr. Examiner, with your indulgence.

Q. (By Mr. O'Brien): Mr. Newsom was not offered a job in any other department?

A. He was offered the opportunity to make application for transfer to any department he saw fit.

Q. He had that opportunity at any time?

A. And I have that opportunity.

Q. Yes, and I can make application at any time with the Gas Company.

Mr. Luce: That is not the question.

Trial Examiner Myers: Let's not get too frivolous.

Mr. O'Brien: My apologies. withdraw the question.

Q. (By Mr. O'Brien): My next question is what would follow the application for making a transfer?

A. Having made the procedure once myself, I would like to use my own thing as an example if I am permitted. [214]

Trial Examiner Myers: Go ahead.

The Witness: I was working for the transpor-

(Testimony of Harold L. Warden.)

tation department. I didn't like the type of work I was doing, it was night work. However, my work record had been satisfactory and I went to the superior and asked his permission to transfer to another department, stating my reasons.

He acknowledged my reasons and believed that they were good. There were many personal family reasons involved in it——

Trial Examiner Myers: What do you mean, "family reasons?"

The Witness: My little boy was just starting to school and——

Trial Examiner Myers: That is enough.

Q. (By Mr. O'Brien): All I want is the physical procedure were I to apply for a transfer.

A. I would like to go ahead.

Trial Examiner Myers: Let's not go into too much of the details. What is the physical procedure?

The Witness: You go to your superior, state your reasons for the transfer, make your application to the personnel department for the type of work that you are interested in, or that they might have available for you——

Trial Examiner Myers: Must there be a job available?

The Witness: Yes, of course, you are continuing to work. You make application to the personnel department that you are desirous of a transfer to a specified job. You can specify that job yourself or you can go to the personnel department and

(Testimony of Harold L. Warden.)

discuss your problem with them, asking them what they have that you are qualified for in another department that would suit you more.

When a position is located to the satisfaction of the employee, then the superintendent, or the supervisors of the two positions involved, the position from which the man is leaving and the one he is going to, contact one another and they decide between themselves if the transfer is agreeable between the two departments, or whatever arrangements are made, and the man is then notified of the transfer being in effect. He then reports to his new department.

Trial Examiner Myers: The important thing is the agreement between the supervisors, one letting him go and the other being willing to take him?

The Witness: That is a consideration, however, I don't know of a supervisor who holds a man back.

Trial Examiner Myers: Usually a transfer is a promotion.

The Witness: Not necessarily.

Trial Examiner Myers: It may not be.

Was Newsom offered a transfer to a particular department?

The Witness: No, sir.

Trial Examiner Myers: They just said, "You get out of this department and you try to get a job elsewhere with the company"? [216]

The Witness: He was told he was not satisfactory in the department he was now working; that he would have the opportunity to make applica-

(Testimony of Harold L. Warden.)

tion for transfer to some other department, resign or be discharged.

Trial Examiner Myers: While this application was pending in another department, what must he do?

The Witness: If that application had been made during the two weeks' period of time, from the time he was told that until the termination of his employment, I believe the company's position would have been, as indicated by other applications of transfer, that he would probably be retained on his present pay scale until the details of a transfer could have been arranged between Mr. Newsom and any other department in the company.

Trial Examiner Myers: Supposing there was no job available in any other department where his qualifications fit or that the supervisor of that department, in case there was an available job, did not want Newsom. How long would the company keep him in your department?

The Witness: That is a question I couldn't answer in any particular length of time except that in another instance I know of a man who made application for transfer and there was no job available for him. This particular man stayed in the department, I believe, in the neighborhood of four months or longer before the transfer materialized, and then he went to the transferred position.

Trial Examiner Myers: On that instance, was he considered to be unworthy of the job he was holding?

(Testimony of Harold L. Warden.)

The Witness: Yes.

Trial Examiner Myers: And the supervisors wanted to get rid of him?

The Witness: The supervisor deemed it necessary to remove him from the job he was performing because he was not satisfactory.

Trial Examiner Myers: And kept him on the job for four months regardless of the supervisors' desire to have him out of the department?

The Witness: The supervisor was informed of the man's intention of making a transfer, and the policy of the company, I believe, from my own observation in the length of time I have worked for them, that they are most considerate in trying to assist any man in organizing and fitting himself into any specific job.

Trial Examiner Myers: In this case that you refer to, the mour months case, the man made the application voluntarily, didn't he?

The Witness: No, sir, he was required.

Trial Examiner Myers: By his supervisor?

The Witness: He was given notice of termination of employment, transfer or discharge and the man chose the alternate of transfer.

He started his transfer proceeding, contacted the personnel office and at that particular time there was no job that the man could qualify for. However, there was an indication of a job which might develop in the very near future and the man was retained in his position, until a transfer was effected, to a job he was satisfied with and could handle.

(Testimony of Harold L. Warden.)

Trial Examiner Myers: And it took four months for that?

The Witness: I believe it was about that time.

Trial Examiner Myers: I mean, approximately four months?

The Witness: Yes.

Trial Examiner Myers: Now, in other words, if Newsom had made application to be transferred to some other department, he would have been kept there in your department until the transfer went through?

The Witness: I believe that would have been the procedure.

Q. (By Mr. O'Brien): That was not explained to him, was it?

A. Not in detail, possibly.

Q. One other problem with respect to transfer. Both operating and maintenance departments are under the union contract? A. Yes.

Q. And do they have seniority or layoff clauses?

A. Not being familiar with the union contract, I don't know.

Q. But in any event, the union would have to be consulted about putting Mr. Newsom in an equivalent position which might be ahead of some union member?

Mr. Luce: Objected to as calling for the conclusion of the witness. I don't think we want to be bound by somebody's guess as to what the union's attitude or contract would be. If you want the contract, we can supply it.

(Testimony of Harold L. Warden.)

Trial Examiner Myers: If he knows.

The objection is overruled. You may answer.

Mr. Luce: May I suggest that we ask about the rules of the company?

Trial Examiner Myers: If you know the rules of the company with respect to the seniority you may so state.

The Witness: In respect to the union by-laws and rules, I have not been in the union——

Trial Examiner Myers: Not with the union, the company.

The Witness: The company's rules I understand pertaining to jobs not covered by the union contract.

Trial Examiner Myers: What job could Mr. Newsom apply for which he would be qualified for, which would be accepted that would not be covered by the contract?

The Witness: There are a considerable number of jobs in the company that are not covered by the contract. [220]

Trial Examiner Myers: For which he would be qualified? Taking into consideration his experience, his seniority and his length of service with the company?

The Witness: That I don't know. I don't know his qualifications well enough to say that he would be qualified for any specific type of work.

Trial Examiner Myers: I mean a comparable job. His service of three years with the company would fit in with the company business. Of course,

(Testimony of Harold L. Warden.)

he wasn't going to apply for some job that just took manual labor. You were his boss. What job do you think he would be qualified for along the lines of the training that he has and one with comparable salary.

You suggested or one of the supervisors suggested he apply for a transfer. What department did you have in mind, the shipping department?

The Witness: I had no department in mind. There are needs for good men in our company and the personnel has the particulars of the needs.

Newsom has abilities. He has ability to learn. Heis personable, and he is likeable. [221]

* * * * *

Cross Examination—(Continued)

Q. (By Mr. O'Brien): Mr. Warden, I will ask you to look at Respondent's Exhibit No. 2. I believe you have a copy of that before you.

Does that include all the work that was done by Mr. Newsom during the month of January, 1951?

A. It does not, no, sir.

Q. What other records are there of Mr. Newsom's work?

Perhaps I could help you. The daily log would show the work he did during that period? [223]

A. That is correct.

Q. And I assume he made other boiler tests than are shown in Respondent's Exhibit 2?

A. Not during the latter part of January, no, sir.

(Testimony of Harold L. Warden.)

Q. This is only supposed to cover the latter part of January?

A. Yes, primarily, because of the fact it was on the 15th of January that I assigned Mr. Newsom as a routine at Silver Gate.

Q. You think this is primarily intended to cover two weeks' work?

A. It only covers the two weeks' period.

Q. In addition to Respondent's Exhibit No. 2 and the log, are there any other records of Mr. Newsom's work during the two weeks?

A. Yes, I believe there are others.

Q. Did you have any particular reason for not including them in Respondent's Exhibit No. 2?

A. Because there were no errors on those records.

Q. Did you check the records of the work of other instrument technicians during the same period? A. Yes.

Q. And you also checked the errors in their work?

A. The work that was done was not too readily checked for errors because there was no routine being done at either station during that period of time. Other than routine work, there is no specific records except for the routine work. [224]

Q. You say there was no routine being done at Station B during the latter part of January?

A. I believe that is correct. I don't know if we did any during that period of time. If it was done,

(Testimony of Harold L. Warden.)

the records were checked and were found to be acceptable.

Q. How long did it go without routine?

A. Approximately the same length of time as Silver Gate. From August until the first of the year.

Q. That is a period of at least five months?

A. That is correct, yes.

Q. Had there been other periods when one station or the other had gone without routine?

A. Yes.

Q. What was the longest period?

A. I don't remember any exact time. In each year during the overhaul period, we omit the routine in preference to the overhaul work.

Q. What is this job instruction book that you refer to in your testimony?

A. It is the instruction book that we have at each station outlining in some detail, but not complete explicit detail, what is required by the items mentioned, numerically, and then set down by description.

Q. That is, Pages 2 and 3 are taken from the job instruction [225] book? A. Yes.

Q. The job instruction book would have about how many pages?

A. It has quite a number, covering the routine complete. I haven't counted them. I would estimate approximately 25 or such pages in each book.

Q. What is Page 2 inserted for?

A. Page No. 2 of this exhibit covers——

(Testimony of Harold L. Warden.)

Q. I mean why was it included?

A. Because it covers the weekly work and the weekly work in the second column was in question, particularly, Item No. 4.

Q. (By Trial Examiner Myers): What is your notation on Page 2?

A. Items No. 2 and 3 are to be done by the regular man at the station.

Q. And was Newsom one of the regular men?

A. No, sir, he was not considered a regular man while he was assigned routine duties.

Q. You put that notation on that sheet?

A. Yes, I did.

Q. When did you do that?

A. Quite some time ago.

Q. Before February 1 of this year?

A. Yes, definitely.

Q. Does each technician have a book containing the rules? [226]

A. No, sir, there is one book at each station.

Q. The technicians are required to consult the book from time to time?

A. Yes, that is the purpose of the book so that the technicians can have the information available to them.

Q. That notation is that the technicians are not to bother with No. 2 or No. 3?

A. That note is there so that the regular assigned man is not held responsible for taking the head tank samples or checking the water test stations on a weekly basis at Silver Gate.

(Testimony of Harold L. Warden.)

Q. And, reversely, the technicians are not supposed to bother with No. 2 and 3?

A. The man assigned to routine is not to do that, but the technicians are more or less assigned at the stations for a period of time and are asked to make these samples and to make the checks.

Q. In other words, whoever is regularly assigned to the stations should perform the four functions?

A. No, sir, two functions, Items No. 2 and No. 3.

Q. What about Items No. 1 and 4?

A. Items No. 1 and 4 are to be carried by the man assigned with the routine.

Q. When a technician is assigned, regularly, to a station he only performs Items No. 2 and 3?

A. That is correct.

Q. When he is not assigned, permanently, to the station, he is to do No. 1 and No. 4?

A. That is correct.

Q. In other words, sometimes these two technicians assigned to the station would not perform No. 1 and No. 4?

A. That is the procedure we work and it has worked quite satisfactorily.

Q. I just wanted to clear that up in my mind.

A. There is more than one technician at a station at a given time.

Q. (By Mr. O'Brien): With reference to Pages 2 and 3, does that describe all of the routine work?

A. It describes only the routine work required on a weekly basis and on a monthly basis.

(Testimony of Harold L. Warden.)

Q. But you said there have been periods of months when there has been no routine done?

A. That is correct.

Q. Would you say it is the exception rather than the rule to keep this weekly routine?

A. No, sir, it is the rule.

Q. Except when you are too busy?

A. Except during the overhaul period.

Q. Is making a boiler check part of routine?

A. Yes. [228]

Q. And where would that appear on Pages 2 and 3?

A. That would be indicated as Item No. 3 on Page 3 of the exhibit.

Q. In regard to these boiler checks, referring to Page 4, would you happen to know when the boiler check was made before January 18th, 1951? I mean, did you examine that record recently?

A. The routine boiler check on No. 5 had not been done previously to that for some little time. I don't recall.

Q. Do you mean months or years?

A. Months only because the unit was not installed until August, 1950. I am referring to Boiler No. 5.

Q. On Page 6, is that a different boiler?

A. Yes, that is two different boilers.

Q. As far as you know, when was the time before January 18th, 1951, that these boilers were checked?

(Testimony of Harold L. Warden.)

A. I believe the last routine check was made in August, 1950.

Q. Do you know who made that check?

A. I believe it was Mr. Newsom.

Q. And did you look at that check sheet to see whether it was complete?

A. I believe it was.

Q. Do you remember examining all of the records of Mr. Newsom's work? A. Yes. [229]

Q. In February of this year? A. Yes.

Q. And is the matter included in Respondent's Exhibit No. 2 all you can find wrong?

A. Those are the ones that had errors on them.

Q. That is all you could find?

A. That is all the records that showed errors, yes.

Mr. O'Brien: That is all.

Trial Examiner Myers: Any redirect examination, Judge?

Redirect Examination

Q. (By Mr. Luce): Mr. Warden, you were asked by counsel in what way Mr. Newsom showed disrespect at that conversation between you and Mr. Kalins and Newsom. I think you testified, also, that he had said something about wanting to show you up. If he did, tell us what that was.

A. To the best of my memory, it was that Mr. Newsom told Mr. Kalins that he would like to have a meeting with all the men at which time the charges for his discharge would be given the entire men and that he wanted that meeting so

(Testimony of Harold L. Warden.)

that he could put myself on the spot, or the effect of putting me on the spot would be made in front of the other men.

Q. Did he say anything about "show me up"?

* * * * *

The Witness: In general, as I stated, I do not remember the exact words, but it was to show Warden up or to put Warden on the spot. Both of these terms were used.

Q. (By Mr. Luce): That was the conference on January 31st? A. That is right.

Q. Now, Mr. Warden, another thing in your testimony. You were asked to state the capacity of the two powerhouses, Station B and Silver Gate. I believe you used the expression that Station B had the capacity of 100,000 megawatts, is that correct? A. That is not correct.

Q. What is the correct capacity?

A. 100,000 kilowatts.

Q. What is the capacity for Silver Gate?

A. It has a rated capacity of 160,000 kilowatts.

Q. In other words, you used the term megawatts when you should have used the word kilowatts in measuring the capacity of the stations?

A. I don't know if I understand your question.

Trial Examiner Myers: The figures you gave us are correct?

The Witness: That is correct.

Mr. Luce: That is all.

Q. (By Trial Examiner Myers): Mr. Warden, I think you testified, and if I am in error, please correct me, that at one of the meetings that you

(Testimony of Harold L. Warden.)

attended when Newsom and the other technicians were there, that there was some talk about these people not being eligible to join the union, or the union had no right to represent them because of the confidential nature of the work of the technicians. A. Yes.

Q. Who brought up that discussion? Who posed that question?

A. I believe, if my memory is correct, that Mr. Hathaway mentioned there might be some possibility that the men would not be eligible to join the union because it would be necessary for the company and the union to agree as to whether or not the type of work we are doing would be of a confidential nature.

I believe that statement was made during the meeting when all of us were in Mr. Hathaway's office in the afternoon of the 15th of January.

Q. That was the first meeting of the employees and Mr. Hathaway—when I say the employees, I mean the technicians—when you discussed for the first time the union designation of these technicians?

A. That is correct.

Q. Did Mr. Hathaway say why he brought that up?

A. No, sir, I don't believe he did.

Q. Well, did he say his position or the company's position as to the union designation of the technicians?

A. He stated his position inasmuch as he could not see any reason for the men not joining the

(Testimony of Harold L. Warden.)

union because the largest portion of the employees under his direct supervision are union members and have a very enjoyable relationship between the workers and himself.

Q. Did he say that the technicians shouldn't join the same union that the other employees belonged to, or should not join any union?

A. No, sir.

Q. What was the discussion about?

A. Why that one point was brought up?

Q. About the confidential nature of this work.

A. It was during the general discussion that we had with Mr. Hathaway, during which time the men had stated that they hadn't officially made their decision and were talking in a general manner as to the pros and cons in regard to joining or not joining the union.

Q. I think Mr. Newsom testified in regard to the technicians and the confidential nature of the work that some discussion was had about watchmen not belonging to the union; do you remember that?

A. Yes.

Q. Would that help you to tell us about the entire discussion about that?

A. In my memory, I remember nothing being mentioned in regard to watchmen during the meeting with Mr. Hathaway. I don't remember whether the watchmen belong to the union or not. [233]

Q. I don't mean the watchmen of your company, but in general.

A. I don't recall anything of that nature.

(Testimony of Harold L. Warden.)

Q. Or guards?

A. I don't recall anything of that nature coming up at that meeting.

Q. Was it discussed with you at any time?

A. No, sir, I don't remember.

Q. The point is not too clear in my mind why the question of confidential work was brought up and what was said.

A. To the best of my memory, as I said, sir, I don't remember what preceded the statement of Mr. Hathaway's that would bring that point out. I am trying to remember. It seems in my memory that something was mentioned as to the possibility of whether or not men would be able to join the union, and I believe that possibly was brought forth by one of the instrument men themselves. It is hazy in my mind and I don't remember.

Q. Did he say why he didn't think he would be allowed to join the union or the union would accept him?

A. Do you mean Mr. Hathaway?

Q. Or anybody else.

A. No, sir, Mr. Hathaway only stated that it would be necessary for the union and the company to agree as to whether or not the work of the men was of a confidential nature. [234]

There are, I believe, certain employees of our company who are not eligible to become a union member and is acknowledged as such, in general, with the union.

(Testimony of Harold L. Warden.)

Mr. Luce: Is that what Mr. Hathaway said, that which you are now telling us?

Trial Examiner Myers: Just tell us what was said. Strike out how you construe the contract. The contract is not in evidence and we don't want any discussion about it.

Q. (By Trial Examiner Myers): Now, at this meeting was anything said about job descriptions of the technicians? Later on, I believe, you procured a description of their jobs?

A. I don't believe there was anything mentioned of the job descriptions at that meeting.

Q. How did you happen to secure from the personnel office a copy of the job descriptions?

A. At the request of Mr. Fowler.

Q. And did he tell you why he wanted it?

A. Yes, that they were preparing their case in regard to asking for more money.

Q. Did he say he wanted to show the union that the job was not of a confidential nature and therefore he was of the opinion that the technicians were eligible to be represented by the union?

A. No, sir. [235]

Q. He just wanted a copy of the job descriptions to give to the union?

A. No, sir, he did not. He said the purpose of it was in assisting the instrument men in preparing their case to be presented to the union so the union could ask or make the demands on the company for more money.

(Testimony of Harold L. Warden.)

Q. That is what the purpose was, to give it to the union? A. Apparently so.

Q. He obtained it for the purpose of communicating it to the union, what his job and the other technicians' jobs really were? A. Yes.

* * * * *

JOHN T. HARDWAY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Luce): Mr. Hardway, what is your occupation?

A. Lieutenant in the United States Navy.

Q. Where are you stationed?

A. San Francisco Naval Shipyard.

Q. You reside there at the present time?

A. I do.

Q. Now, when were you first employed or connected with the San Diego Gas & Elactric Company? A. The latter part of June, 1946.

Q. And in what capacity?

A. As a junior engineer.

Q. Now, prior to your employment by the San Diego Gas & Electric Company, what had been, generally, your experience. [237]

A. I had just been released from the Navy at that time. Prior to that I had been in school getting my degree in engineering.

(Testimony of John T. Hardway.)

Immediately after graduating, B.S.M.E., I came into the company's employ.

Q. Were you trained in any particular line?

A. As a mechanical engineer.

Q. After you became connected with the company, when did you first come in contact or acquainted with Mr. Newsom?

A. I came into personal contact with him after I became efficiency engineer.

Q. When did you become efficiency engineer?

A. November, 1948.

Q. What were your duties as efficiency engineer?

A. Supervising the test department with respect to maintenance and repair of all automatic instrumentation. Also supervising all tests and calculating in the laboratory, solving any engineering problems which the superintendent of electrical production might give us for solution, possibly of an engineering nature. But the biggest responsibility was the instrument portion of that department.

Q. Who was your immediate superior?

A. Mr. Hathaway, superintendent of electrical production.

Q. Who was immediately under you? [238]

A. Mr. Warden—not, it was Mr. Geiger when I first became efficiency engineer and then Mr. Warden succeeded Mr. Geiger as instrument engineer.

Q. Then, when did you leave to go back into the service? A. At the end of August, 1950.

Q. And you were succeeded then by Mr. Kalins?

(Testimony of John T. Hardway.)

A. That is correct.

Q. And, prior to your leaving, Mr. Kalins was your assistant, is that correct?

A. That is correct.

Q. Now, will you tell us when you first had personal contact with Mr. Newsom?

A. Well, first, when I became efficiency engineer he was an instrument technician B at that time. Our procedure is to become personally acquainted with the people under our supervision. At that time he was doing rather well and there had been no complaint turned over to me by my predecessor. He was doing the work satisfactorily for his immediate supervisor at that time.

Q. When did you first observe, if you did, any inefficient work on his part?

A. Approximately June, 1949, or 1950, rather.

Q. June, 1950? A. Yes.

Q. State what occurred at that time and what conversation, if any, you had with Mr. Newsom.

A. Well, prior to that meeting that I asked for with Mr. Newsom, Mr. Warden came to me with a series of complaints that Mr. Newsom was not putting out the required amount of work.

Mr. Warden's instructions were at that time from me that any time we had a specific case, in other words, something definite that we could ask Mr. Newsom about, to let me know.

In June, Mr. Warden came in and said, "Well, the log is defective," that the work he should have done or the amount of work he should have done

(Testimony of John T. Hardway.)

did not appear on the log.

At that time I asked him to get him in the instrument office at Station B and the two of us went down and I talked to Mr. Newsom at that time.

Q. Will you tell us what was said by you and the reply made by Mr. Newsom?

A. Well, I tried to keep it more or less on a friendly basis as to the idea that it wasn't a bawling out, but simply a request for information to see if there was actually ground for Mr. Warden's complaint. I tried to be as fair as possible about it and I thought Mr. Newsom should be able to give us his side on the two days in question when the log showed a small amount of work, which I felt was not a full day's work.

He offered the excuse that he had not been feeling well and, in the course of the conversation, he brought out the fact that he had been overhauling the Orsat apparatus but had neglected putting it on his log. [240]

That amount of time, I really felt, was a little generous even for overhauling an Orsat apparatus because I had done that work myself previously. It was prima facie evidence that the man had been slacking and I tried to explain that the log was very important; that they were not primarily a check on how much the man did—I think that has been a little overemphasized—but rather a record of what was done so that if anything should happen some person would be able to check and

(Testimony of John T. Hardway.)

see when a certain piece of equipment had been checked and looked into.

Of course, indirectly you use that as a measure of a man's work and having spent a short while as junior engineer in the instrument section myself, doing the same work as an instrument technician, I felt I had a better idea of what could be done in eight hours.

Q. Did you tell that to Newsom?

A. Mr. Newsom was under the impression—I felt he knew that I had had that experience.

Q. What did he say to you and what did you say to him?

A. In regard to the work, that we tried to work as a group there, and this wasn't a bawling out, that I was merely pointing out a possible deficiency and if he had an excuse to offer I would be very happy to hear it.

If he was at fault, we would like to do anything we could to help him at the time. That was the point he brought up, the fact he had spent quite a little time on the two jobs in question and had worked some extra time; that he had omitted it on the log, and just in case there had been some misapprehension about being qualified for the job —I shouldn't say misapprehension—I asked him if he liked instrument work and I received the reply that he did.

I based that on my feeling that a man doesn't do a really top-notch job——

Q. We are talking about the conversation.

(Testimony of John T. Hardway.)

A. Yes.

Q. What other conversation did you have at that time?

A. That was the substance of the entire conversation.

Q. Was anything said in conclusion by you?

A. More or less just a remark that I hoped that he would improve, as I remember.

Trial Examiner Myers: Just the two of you were there?

The Witness: No, Mr. Warden was present. I don't like to talk to subordinates——

Q. (By Mr. Luce): Just the conversation, please. You said you hoped he would improve. What did he say?

A. He promised that he would.

Q. When was the next time any matter was called to your attention? [242]

A. Approximately six weeks later. Mr. Warden, upon my question as to how Newsom was doing, said he had been doing all right but seemed to be slipping again. However, I didn't take any action at that particular time.

I did have a complaint from Mr. Campbell, the Station Chief, that there had been some horseplay by Mr. Newsom and Mr. Webb, who had been working together at Station B, which he objected to. At that time I asked Mr. Warden to investigate. It was a matter of a sign, supposedly humorous, pasted to the wall. He investigated and reported Newt had denied being responsible for

(Testimony of John T. Hardway.)

that, and as far as that was concerned, that closed the matter. I did relate the matter to Mr. Campbell, but that closed the matter with Mr. Campbell with reference to that specific instance.

However, I did have another mention of horseplay, just general, and I asked Mr. Warden to drop a hint that that wasn't the accepted thing within the station.

Q. When did you next hear of any complaints?

A. At one time, I can't remember whether it was before or after Mr. Campbell's particular complaint, Mr. Prout called and complained that Newt, being at Silver Gate at the time, had not complied with a request to fix some gauges. When I queried Mr. Warden about the matter, it was a situation in which Mr. Newsom had been instructed, through Mr. Warden, that whenever a station chief or an assistant chief made a request that was not an emergency, for him to contact Warden immediately so that it could be worked in in the day's work. He had not done so and Mr. Warden looked into the matter for me and reported that the work he had assigned to Mr. Newsom was not being done to his satisfaction; that when he talked to Mr. Newsom about that work it was the excuse that Mr. Prout had requested some other work meant to be done on that, and, of course, when we came back and asked him about Mr. Prout's work, there was the excuse that the work had been assigned by Mr. Warden. The impression I got was that neither work was being done too well.

(Testimony of John T. Hardway.)

Q. Did you talk to Newsom further?

A. Only one other time, more or less as a chance meeting, in the instrument office at Silver Gate. That was a matter of overtime. Mr. Warden had said that he had had a complaint from Mr. Newsom that he had not been getting his share of overtime. I felt the inquiry did not require too much formal investigation and the next opportunity I had of meeting Newsom I looked into the matter a little bit. I was satisfied in my own mind that the complaint was not warranted. Newsom had been losing out on a little bit of overtime, but he had been very fair in keeping a record of which technicians had overtime and offering them the opportunities in turn with the idea that if they had other business and could not work overtime, the second man on the list was given that overtime instead.

Mr. Newsom was in some glee club at the time and it was not convenient for him to work overtime at the particular time requested. [244]

Mr. Warden's procedure was quite satisfactory and required no other remarks by me.

Q. Did you hear Newsom criticize Warden?

A. No, sir, I never did.

Q. Did you check or investigate the work of Newsom and the other technicians in regard to how the work was going on in the combination of the different men?

A. Yes, I had a report from Mr. Warden, again. I asked him how things were going. It ran in

(Testimony of John T. Hardway.)

conjunction with the horseplay complaint. Mr. Warden had reported to me that the work had not progressed too well and Mr. Newsom was paired with one of the other technicians. The log, over a period of time, seemed to indicate that when Mr. Newsom was paired with one of the other technicians that neither one of them did any amount of work. Yet, you could take any one of the other technicians and put him by himself and it was surprising the amount of work listed on the log jumped.

At one of my suggestions Mr. Warden paired two of the other technicians together, without Mr. Newsom, and the work again held out. Back pairing with Newsom, the work dropped again and Mr. Warden's instructions were that when Newsom was not working under his direct supervision, that for a period of time we put him on routine where he would be working by himself, without someone to talk to. Under these conditions he would put out a fair amount of work.

Q. Did you set up a system of rotation?

A. Yes, I did.

Q. That is, of the technicians? A. Yes.

Q. What do you mean by a system of rotation?

A. Well, we had been faced with a problem of securing qualified technicians who were familiar with both stations, and with the fact that we felt we would like to rotate Mr. Newsom around a little bit and equalize the undesirable work. So that no one could feel he was being picked on, we tried

(Testimony of John T. Hardway.)

to set up a rotation policy where one would take the routine at both stations for three months and the rest of the technicians would be working on either overhaul or the regular work that was occasioned by instrumentation.

Q. During the period that you were efficiency engineer, you had occasion to observe the work of Newsom and the general attitude of his superiors, did you not, towards him and their opinion of his work? A. Yes.

Q. And did you come to a conclusion before you left as to what should be done about Mr. Newsom?

A. Yes, I did, but I got my orders too soon to carry them out.

Q. Did you think up to that time that the character of his work permitted either a termination of his employment or a termination so far as the instrument department is concerned? [246]

* * * * *

Q. (By Mr. Luce): In your opinion was the character and quality of Mr. Newsom's work, at the time you left, sufficient to warrant his dismissal?

* * * * *

The Witness: I won't say it was that bad, but I will say it was unsatisfactory enough that I would have gone into a rather detailed investigation. I would have taken the time myself to have gone into a greater detail, which otherwise was not warranted, and would have come to a final conclusion then whether his removal was justified.

* * * * *

(Testimony of John T. Hardway.)

Q. (By Mr. Luce): Mr. Hardway, did you ever write a letter recommending Newsom and Webb to Mr. Hathaway? A. No, sir. [247]

Q. Did you ever write any letter or make any report in which you reported Newsom's work as being satisfactory or recommending his high character of work?

A. Not the high character of work.

Q. Anything similar to that?

A. Nothing at all in writing. Orally, I have said, and I still say, that he is a personable young man, but I wasn't satisfied with his work. There was however, no recommendation.

* * * * *

Cross Examination

Q. (By Mr. O'Brien): You say you worked as an instrument technician. Who was your superior?

A. I was paid as a junior engineer, under the supervision of Mr. Stovall, but I was working as an instrument technician under the supervision of Mr. Geiger, who was instrument engineer at the time.

Q. You must have been working side by side with Mr. Newsom?

A. No, sir, because Mr. Newsom came with the department, I believe, after I was removed from the instrument gang and had taken over my duties as junior engineer at Silver Gate.

Q. So there was an interim when you were out of the instrument department? A. Yes.

(Testimony of John T. Hardway.)

Q. When you came back as efficiency engineer —that was your title? A. It was, yes.

Q. ——who were your instrument technicians?

A. Mr. Geiger as instrument engineer, Mr. Warden as instrument technician A, Mr. Newsom and Mr. Bill Porter. That was it.

Q. Mr. Warden we know was promoted?

A. Yes.

Q. Mr. Porter?

A. He resigned for a more lucrative position.

Q. Then, in order, who was your first replacement for Mr. Warden and Mr. Porter?

A. You mean after Mr. Warden became instrument engineer?

Q. We started out with a staff of Geiger, Warden, Newsom and Porter. What were the changes?

A. Mr. Geiger became junior engineer, Mr. Warden became instrument engineer——

Q. And the replacements as they came along?

A. The first replacement was Ollie Webb.

Q. Did you have anything to do with interviewing Ollie Webb? A. Yes, I did.

Q. And did you have anything to do with assigning him to work with Mr. Newsom?

A. He was hired on my recommendation as an instrument technician. The work assignment I left entirely to Mr. Warden's discretion.

Q. After Mr. Webb, who was next?

A. Roy Shroble.

Q. Did you again hire Mr. Shroble?

A. I did.

(Testimony of John T. Hardway.)

Q. How long did Mr. Shroble work for you?

A. Approximately two months. He was the last man who was hired while I was instrument engineer or efficiency engineer.

Q. Are those all of the instrument technicians that worked under you then? Newsom, Porter, Webb and Shroble?

A. We had one helper assigned to use for one short period, but I had no immediate contact with him.

Q. You don't know his name?

A. No, sir, I don't recall it at this time.

Q. Was it Bob Cole?

A. I had forgotten about Bob.

Q. There was somebody else besides Bob?

A. I think I will draw the line there.

Q. Well, it is your testimony that when Mr. Newsom worked with Mr. Porter that Porter's work fell down?

A. No, sir, Mr. Porter was a senior man at the time under Mr. Warden. Unfortunately, Mr. Porter was an all too rare character. I wish to heavens he had stayed. Mr. Porter was the exception.

Q. In the two months that Mr. Roy Shroble worked under your supervision, how many different technicians did he work with? [250]

A. I believe he worked with them all at one time or another.

Q. It took at least two months to learn the job?

(Testimony of John T. Hardway.)

A. It takes longer than that, but when an instrument technician comes in the work he does is largely as a helper. It is still a two-man job and your output is more or less measured by the output of two men. When that falls down, the whole job falls.

Q. Now, aren't there situations where an experienced man can do the job more quickly by himself than when he is teaching an inexperienced man how to do it?

A. Yes, but from a practical point there were times when the actual teaching went by the board in the interest of getting the job done. That was the reason that this training course was brought into effect, to pick up those missing points.

Q. Isn't it possible that Mr. Newsom's log, while he was working with Mr. Shroble, would show less work because of the necessity of teaching Mr. Shroble?

A. That is quite true, but he was only with me for a period of two months and the period in which I became aware of Mr. Newsom's work was prior to the hiring of Mr. Shroble.

The drops in the work and the pairing of Mr. Newsom was primarily with Mr. Cole and Mr. Webb.

Q. Do you know who taught Mr. Cole the work in the instrument department? [251]

A. Mr. Warden. He also spent some time working with Mr. Porter. The actual training there I left to Mr. Warden.

(Testimony of John T. Hardway.)

Q. Did you observe the work of these instrument technicians?

A. Only on rounds which were made occasionally. I stopped to talk to the fellows to see how they were doing. I depended largely on the log as to what had been done and what equipment was requiring more maintenance than usual.

I had other duties which took care of a larger portion of my time.

Q. Did you, yourself, observe the horseplay?

A. No, sir, I didn't, not out in the plant. However, any complaint by a station chief is time for me to take a look into the matters.

Q. You don't recall when this first complaint by a station chief was made?

A. No, sir, I don't. I will make an estimate it was in the summer of '49, summer or late spring. It was before the main pressure of Silver Gate overhaul started.

Q. What was the incident of the sign on the wall?

A. That was the specific incident when I asked whether the fellows had done it.

Q. You never did find out?

A. No, sir, I was satisfied with their word that they had not done it. However, there was another complaint, nothing specific, just horseplay.

Trial Examiner Myers: Did you say that took place in the spring or summer of 1949?

The Witness: 1950, I am sorry.

(Testimony of John T. Hardway.)

Q. (By Mr. O'Brien): Which station chief was that? A. Mr. Campbell.

Q. Did he say "horseplay," and describe what it was?

A. Not on that particular occasion. It was not meant to require disciplinary action; he was passing the word to me and he understood my intent was to pass the word down the line to "take it easy," or "let's watch it."

Q. You didn't know what it was?

A. No, I felt if it was specific enough he would have mentioned it.

Q. Mr. Campbell wasn't particularly concerned?

A. He was concerned from the viewpoint that any horseplay in the plant is not a good thing. One person sees someone else do it and it has a tendency to spread.

Q. You didn't think it sufficiently important to inquire into what it was?

A. No, sir, I didn't. I feel that if a complaint is being made and the man wishes action to be taken, that he will specify exactly what it was. However, the word was passed down the line to take it easy.

Q. You say the Silver Gate chief complained. Did he explain to you about Mr. Newsom's failure to fix gauges for him? [253]

A. The assistant station chief, Mr. Prout, did by phone.

Q. That complaint was made directly to you?

A. Yes.

(Testimony of John T. Hardway.)

Q. Then, you went into some sort of an explanation about Mr. Newsom having received general instructions relative to requests of station chiefs. Did you yourself give Mr. Newsom these orders?

A. No, sir, I passed these orders, which were merely confirmations, to Mr. Warden for his further passing to the technicians involved.

Q. When did you give Mr. Warden these instructions?

A. It was a repetition of already existing instructions that had been customary.

Q. Were these written instructions?

A. They are now. Sometime later, when we set up the rotation policy, we outlined the program in rather a broad phraseology. That filled the need for written instructions governing that procedure. It had been a custom before.

* * * * *

Q. You don't know whether he actually formal instructions to that effect?

A. Actually, no. That was an assumption I had to make. [254]

Q. You are assuming that your subordinates carry out your instructions?

A. That is correct.

Q. Can you say that Mr. Newsom was trying to do his own work and trying to do Mr. Prout's, too?

A. In this particular case, we were not trying to be ogreish, but it was a hope that the situation would not arise again.

(Testimony of John T. Hardway.)

Q. And, in any of your talks with Mr. Newsom, did you ever tell him that he would be discharged if the work didn't improve?

A. I don't believe I ever told Mr. Newsom that directly, but I know on one occasion when Mr. Warden—and after this one conversation I had with him, I did make that statement to Mr. Warden. That was left to the discretion of Mr. Warden; whether he repeated it or not, I don't know, but I said it.

However, there again, I would say that any action on my part to discharge a man would have been subject to further investigation.

Q. You wouldn't have discharged anyone from the list of Mr. Newsom's omissions or commissions, the ones you have given us?

A. No, not on those alone, but I feel they are existing examples.

I believe my experience would indicate that at the time I left, if I had not been so busy, and instrument technicians had not been needed so terribly—well, a half man was better than no man.

That is my opinion, and I believe I could have found a lot more than we have discussed here. I still had the impression we were not getting all we were paying for.

Q. If you had really gone over enough records, you could find signs of omission and commission against all of your subordinates?

A. That is true, but on the other hand there are some that are worse than others.

* * * * *

(Testimony of John T. Hardway.)

Q. (By Trial Examiner Myers): Did Mr. Warden, while he was the head of the instrument technicians department—I call it that for reason of a better phrasing—ever complain to you about any other instrument technicians?

A. No, he didn't. That is one of the bases of my opinions that there is also a possibility that Mr. Warden wasn't the best supervisor in the world. Yet, on the other hand, Mr. Newsom was the only one, as far as I know, that Mr. Warden had difficulty with. [256]

* * * * *

Q. Can you tell me how a log is made up and who does the physical work in the log?

A. Yes, I can.

Q. Please do that.

A. As far as the instrument log is concerned, normally the technicians will use small sheets of paper on which to list their work they have been doing during the day. Sometimes they are turned over at the end of each day to the instrument engineer. Sometimes they are kept and accumulated until the end of the week.

On Tuesday morning, usually, Mr. Warden takes all these slips, copies the instrument technicians' work summary in a daily log, there being one series of sheets for Silver Gate and one for Station B, and on Tuesday afternoon or possibly each Wednesday morning, I requested that it be done by 10:00 o'clock, he would bring these sheets to me.

(Testimony of John T. Hardway.)

In the meantime, I had prepared my own log covering my own work, including that of my assistants, and the three logs were then taken up and placed in a loose-leaf folder in the main office on the third floor at Station B.

Q. What are the routine sheets like? Referring to this first page on Respondent's Exhibit No. 2, is that what you call the scrap paper?

A. Oh, no.

Q. What is this?

A. This is called a routine sheet. It used to be prepared by one of the junior engineers, but during my time the instrument engineer took over the preparation. He makes one of these per month. It is basically a very brief outline of approximately when work should be done.

This is prepared as a guide to be used by the instrument technicians. For instance, I see numbers 2, 5, 1 and 4 on approximately the 15th or 16th of the month. Now, the technicians responsible for the routine work should check on the 15th and see what items he is supposed to do. Then, if he performs those, he will add a check above the number signifying that it has been done. Concurrently, if there is a detailed record of that particular operation, then he will enter those readings on that particular page.

Q. Do you mean Page 4 of this exhibit?

A. Yes. In this particular case, he will submit it to the instrument engineer on these test forms and the instrument engineer then submits them

(Testimony of John T. Hardway.)

to the efficiency engineer. If it is a full-load test, they usually go through a series of calculations to determine the efficiency of operation at that time.

Q. You heard a lot of discussion about the psi on Page 7 of the exhibit? A. Yes.

Q. Can you clear up that for me?

A. Psi means pounds per square inch. That is the normal pressure here in everyday life.

Q. I know that. There was some talk about it should have been inches mercury?

A. Yes, it should have been. In other words, the gauge that was read in this particular case was calibrated in inches of mercury, not psi, and should have been so recorded. That item should have been changed because in the instruction sheets there is a sample data sheet with all relevant readings for each machine checked off and any change is in the left-hand column. Therefore, the technicians, when they prepare their daily sheets, can refer to that and make a corrected daily sheet before tagging the test.

Q. In other words, what Newsom should have done was to change psi to inches of mercury.

A. Yes. [259]

Q. Now, would anybody who has any knowledge of this work—the work Warden was doing, you were doing and Newsom was doing—would they be confused by the mere omission of changing the psi to inches of mercury?

A. In running a calculation you might pick it up as psi. I have done that myself, but have caught

(Testimony of John T. Hardway.)

my error and have gone back and picked up the correct amount.

Q. You would have seen it?

A. I may not have in running through the calculation.

Q. The purpose is to find out whether the turbine was working, or the heat of the water or what?

A. Usually the cleanliness of the feed water heater.

Q. Well, you would have seen that you were taking a pressure of psi instead of inches mercury?

A. Yes, if I had calculated it at psi, I would have had an error.

Q. Would it have been such an error that you would have seen it right away?

A. It probably would have taken 15 or 20 minutes to go back and recalculate it.

Q. All right, what is done with the sheet, page number 7 of Respondent's Exhibit No. 2?

A. They are kept on file.

Q. Is that put in the log?

A. The running of the test is logged in the instrument engineer's log. The calculation of the test, the result, is entered in the efficiency engineer's log.

Q. What data on this page is put in the log?

A. No data is put in the log. These are kept on file and sometime later if we want to find out when a test has been run, we check the file to find that information.

(Testimony of John T. Hardway.)

Q. And if everything was in order, nothing out of gear or anything, everything is O.K.?

A. That is right.

Q. That is what you assume. That the test was run and if there is no comment mentioned, that the test was successful, whatever you tested?

A. Normally, the log is the work that was done that day. If we are seeking out daily information, there is a grouping of the data, but that is not usual.

Q. If there was anything wrong you can go back and fix it? A. Yes.

Q. So that everything up to that point was working right?

A. We assume that. We use these as a trend indication more than actual pinpoint of trouble.

Q. So if any trouble develops you can go back to where you ran a test and see what comes of it.

A. That is right. [261]

* * * * *

B. L. STOVALL

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: * * * * [262]

Direct Examination

Q. (By Mr. Luce): Mr. Stovall, you are now an officer of the United States Navy, are you?

A. Yes.

Q. And what is your rating?

(Testimony of B. L. Stovall.)

A. Lieutenant-Commander.

Q. What are your present duties?

A. I am assigned to the Industrial Command, United States Naval Station in San Diego.

Q. When were you employed by the San Diego Gas & Electric Company, if at all?

A. You mean initially?

Q. Yes, we will start with that.

A. In 1937 I started working with the special-construction department of the San Diego Gas & Electric Company as a pipe-fitter's helper in the special-construction department.

Q. And how long did you remain in the employment of the company at that time?

A. Until August of 1938, at which time I returned to the University of California for further engineering training.

Q. How long did you stay at the university?

A. I stayed at the university until May of 1940. I was employed by the San Diego Gas & Electric Company during the vacation periods as a student engineer.

Q. And after 1940?

A. I entered the employ of the San Diego Gas & Electric Company again in the electrical production department as instrument technician.

Q. Go on and state your course of employment and training from there on.

A. After serving several months in the instrument-technician group, I became engineering assistant, in which capacity I served until April 27, 1942.

(Testimony of B. L. Stovall.)

At that time I was accepted by the Navy for duty, given a commission as Lieutenant Junior Grade, and served for some 40 months as an engineering officer assigned to the Sub-Board of Inspection and Survey in the Eighth Naval District.

I returned to the employ of the San Diego Gas & Electric Company upon release from active duty in December, 1945.

I went to work at that time as junior engineer and served in that capacity until approximately May 15, 1946, at which time I was appointed efficiency engineer and served in that capacity until sometime in November, 1948.

At that time I became assistant station chief at Station B and served in that capacity until my recall to active duty in August, 1950.

Q. You are still now on active duty with the Navy? [264] A. Yes.

Q. When did you first come in contact with Mr. Newsom? That is, to know him or know anything about his work, Mr. Cosby Newsom?

A. My experience with Mr. Newsom in a supervisory capacity is rather limited. As I recollect it, it comprised possibly a month on or about October or November, 1948.

Q. Where was that?

A. That was at Station B.

Q. Mr. Stovall, to refresh your memory, wasn't it in 1949, rather than in 1948?

A. I am short on my chronological sequence. My recollection is 1948.

(Testimony of B. L. Stovall.)

Q. At any rate, he did work under you for a short time at Station B? A. Yes.

Q. Did you observe anything in regard to his quality of work in that time?

A. He served under me for the first month of his assignment to the instrument technician group,

Normally, training for an instrument technician was done at that time, but due to the exigencies of the work load—the training period would normally comprise a year, at least. For me to judge a man's ability as an instrument technician during his first month is very hard. In fact, it is impossible. [265]

The man has a very good personality, he talks a very good game. At that time I certainly felt that we had a good prospect as instrument technician.

Q. What did you observe as to his work from there on?

A. I was removed from his direct supervision and assigned the job of assistant station chief.

As time wore on, up to six or eight months later, I recollect, not specifically, but generally speaking, that I made three complaints: One to the station chief concerning the horseplay indulged in by Mr. Newsom.

Q. Did you say anything to Newsom about it?

A. No, I approached his superior, Mr. Hardway.

Q. Did you tell Hardway about it?

A. Yes.

(Testimony of B. L. Stovall.)

Q. Now, what about his work as instrument technician? What was the character of that?

A. You mean Mr. Newsom on instruments?

Q. Yes.

A. I have no direct knowledge of it. Part of the time he was assigned any responsibility on instruments I was removed from direct contact with him. My immediate worry was the proper functions of the control end of the plant.

I only observed that complaints from the operating personnel on the functioning of the control instruments were brought to me and subsequently carried by me to the efficiency engineer whose responsibility they are. [266]

This resulted, in almost every instance, a series of instances, in Mr. Geiger doing the work or in Mr. Warden coming to Station B from Silver Gate to take care of the trouble, indicating that at that time, up to six months after the hiring of Mr. Newsom, we still only had two competent people to take care of real trouble.

Q. Well, was Mr. Newsom's work such that you or the operating personnel had confidence in the instruments that he was supposed to supervise?

Mr. O'Brien: I object to that. I am afraid it is a loaded question as well as leading and suggestive.

Trial Examiner Myers: I think you ought to reframe the question.

Q. (By Mr. Luce): What did you observe in respect to the work done by Mr. Newsom during the year 1950, we will say?

(Testimony of B. L. Stovall.)

A. I think Mr. Newsom, as far as Station B was concerned, was engaged only in routine matters. That equipment faults were cared for by Mr. Warden.

* * * * *

Q. (By Mr. Luce): Did you observe either the work of Mr. Newsom or Mr. Newsom himself in the year 1950 enough to form an opinion as to the efficiency of his work or his qualifications for that particular job?

A. My personal observation might be stated in this manner: That Mr. Newsom was given to indulging in horseplay, in conversations with any and all who approached him on any particular job. I found my firemen engaged in talking to him by the hour.

I believe that he showed, contrary to the initial concept of his character, a remarkable lack of initiative in attempting to grasp the problems involved. [268]

I found him temperamental and unsuited for the job. That applies only to the instrument technician work.

Q. Did the work improve or otherwise during the period you observed up until you left?

A. I observed no improvement. It was more or less pull and haul all the time.

Q. Would you tell us the general importance of the work of the instrument technicians such as Mr. Newsom?

A. Well, not because I started through that

(Testimony of B. L. Stovall.)

particular door in the plant, but rather from a firm belief, I will state that it is one of the most important functions in the powerhouse. Not from the standpoint of a spectacular explosion the day it is done, but rather because of accumulative damage which equipment can suffer due to faulty setting of temperature and combustion controls.

Q. Well then, faulty work on instruments could cause damage?

A. A poor setting, for instance, on the burner position, register position, can lead to—these are possibilities—a rapid build up of slag in the superheater passes of the boiler due to improper combustions. That, in turn, can lead to excessive abrasive work on boiler tubes within the gas passes. It can lead to heat damage, if you please, further up in the passes of the boiler.

The thing is accumulative and it might occur six months after the improper settings were made.

Q. Well, the interplant operation is related in what way to the instrument regulations?

A. The instrument technician is responsible for the thermal efficiency of the plant from the fuel tank to the generator output. He is actually charged with the mechanics of burning the fuel in the most efficient manner.

Q. What effects, if any, upon the general organization or the plant operation would a lack of confidence in the ability of the instrument technicians have?

Mr. O'Brien: I object to that.

(Testimony of B. L. Stovall.)

Q. Trial Examiner Myers: Overruled. Will the reporter please read the question.

(Question read.)

The Witness: Well, the lack of confidence would initially show up in apprehension on the part of the operators assigned to particular boiler operations. The burning of tremendous quantites of fuel is involved. The fires are some 3000 degrees hot. The combustion spacers are 20 by 30 by 30 and they roar in a very loud manner; instantaneous faults, which occur in the electrical side of the system, cause wide variations in the actual operation of the boiler.

The automatic controls at both stations have to take care of these fluctuations. If they don't, the operators are in trouble. It is possible, if the controls don't work properly, to have the combustion thrown completely off with attendant smoke and the danger of explosion inside the plant itself.

I might add that the principal and most voluminous complaint on controls, faulty control operation, comes directly from the operators who are involved in staying with it 24 hours a day.

* * * * *

Q. (By Mr. Luce): When did you leave to go back into the Navy? A. August 24, 1950.

Mr. Luce: You may cross examine.

Cross Examination

Q. (By Mr. O'Brien): During what months was Mr. Newsom at Station B?

(Testimony of B. L. Stovall.)

A. I am not sure I remember.

Q. Was he ever at Station B without supervision? A. Yes.

Q. When was that?

A. My recollection again would be in the early months of 1949.

Q. Before he had served even six months as an instrument technician? A. Right. [271]

Q. And he wouldn't be expected to know all the intricacies of the instruments at Station B?

A. I wouldn't expect a person to know it.

Q. During this first month when he spent hours talking to the firemen——

A. Did I say hours——

Q. Yes, you did.

A. All right, I will leave it at that. Yes, he has a very pleasing personality.

Q. He spent hours talking to the operators. Did you spend hours watching him?

A. My instructions were to spend 20 percent of the time in the office and 80 percent of the time finding out what makes them tick.

Q. And you didn't tell the firemen and the operators to go back to work?

A. Ordinarily, they made the courteous concession of going back to work, for which I was very grateful.

Q. Did you complain to Mr. Newsom's supervisor that he was keeping your men from working? A. Yes, I did.

Q. To whom? A. Mr. Hardway.

(Testimony of B. L. Stovall.)

Q. In writing? A. Always verbally.

Q. Is that you mean by horse play, talking to the operators and firemen?

A. No, I am thinking specifically of horse play.

Q. Did you tell Mr. Hardway what the horse play was? A. Yes.

Q. What did you tell Mr. Hardway?

A. I pointed out to Mr. Hardway that on specific occasions Mr. Newsom and Mr. Webb indulged in clowning antics for the amusement of anyone who might be watching them.

Q. Did you describe these to Mr. Hardway?

A. Yes.

Q. What description did you give?

A. Well, as they walked through the plant one man went to his knees while the other stood up and then the other one would go to his knees and the other man would stand up. That would continue and it is very amusing to watch, even to me. It continued all the way down through the plant.

Q. So you made the complaint to Mr. Hardway?

A. I described this particular instance.

Q. Did this happen more than once?

A. That particular thing I didn't observe more than once.

I have observed on other occasions while meters were being calibrated that water was thrown around rather promiscuously, the water that was utilized in the calibration of the meter. [273]

Q. It is not exactly a dry job.

(Testimony of B. L. Stovall.)

A. It can be contained, I assure you. I spent some two years at it myself.

The prime consideration in calibrating meters is calibrating meters, which means you keep the water contained within a certain area.

Q. During the time you were assistant chief at Station B, did you have any serious breakdown of equipment? A. Yes.

Q. Do you know what was the cause?

A. Well, you could argue that. I am thinking specifically of some eight generators, turbines, and boilers.

Trial Examiner Myers: When?

The Witness: I think it was during the year 1949. It would be 1949 that we suffered some losses due to the heavy loads we ran into.

Trial Examiner Myers: Was Mr. Newsom employed then? The Witness: Yes.

Trial Examiner Myers: As what?

The Witness: Instrument technician.

Q. (By Mr. O'Brien): Was that breakdown caused in any way by an instrument failure?

A. It very well could have been.

Q. It could have been, but was it?

A. Let me state to you that these damages are cumulative. They result from an operation occurring possibly six months before and I can very well state that the possibility of improper combustion, causing an unbalance in the heat in the furnace, could, over a period of four months, very definitely result in damage.

(Testimony of B. L. Stovall.)

From where I sit now or at any other time I couldn't pin it on any specific man.

I am pointing the need for real care calibration of instruments.

Trial Examiner Myers: Would you attribute it to any fault of the instrument technician department?

The Witness: I would point to the department certainly.

Trial Examiner Myers: That is what I wanted to know.

I don't know anything about this operation and therefore my questions might sound a little odd to you.

The Witness: Not at all, sir.

Q. (By Mr. O'Brien): So if these failures were due to human negligence, you wouldn't know whether it was the operator or any one of the four or five different technicians?

A. The operator depends upon the instruments for the indication of proper combustion. It would largely fall to the instrument group.

Q. There is a possibility that the operator may ignore his instruments? A. I doubt it.

Q. I think you said it was possible for instrument technicians to blow up the plant through negligence. You don't think he would?

A. Not at all.

Q. Of course not.

By the way, you interviewed Mr. Newsom before

(Testimony of B. L. Stovall.)

you took him on as an instrument technician?

A. That is correct.

Q. You had interviewed other applicants for the job at the same time? A. I did.

Q. You believed that Mr. Newsom was the best qualified?

A. I thought so at the time, yes.

Q. During the time that he worked under your direct supervision, you found no fault with his work?

A. That is true, the short period of my direct supervision, yes. [276]

* * * * *

JOSEPH L. KALINS

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Luce): Mr. Kalins, what is your present position with the San Diego Gas & Electric Company?

A. I am efficiency engineer.

Q. How long have you been efficiency engineer?

A. Since the beginning of September, 1950.

* * * * * [277]

Q. Would you state the positions you have occupied up to the present time?

A. I started in as a helper in the maintenance force until September of 1946, as I recall. I then became a junior engineer under Mr. Stovall and remained a junior engineer until the beginning of September, 1950.

(Testimony of Joseph L. Kalins.)

Q. Then what happened?

A. At that time I assumed the position of efficiency engineer and took over the duties of Mr. Hardway who was leaving for military services.

Q. Were you an assistant under Mr. Hardway before he left? A. Yes, I was.

Q. For how long?

A. Since he assumed that position which was in approximately November, 1948.

Q. When did you first become acquainted with Mr. Newsom?

A. I became acquainted with Mr. Newsom at the time he assumed the duties of instrument technician. That should be about October of 1948.

Q. And did you also become acquainted with Mr. Warden at about the same time or prior to that?

A. I knew Mr. Warden prior to that.

I neglected one point in my employment there. As a junior engineer I spent a period of from May of 1948 until possibly December of 1949 doing the duties of an instrument technician. The purpose of this was to familiarize myself with instrumentation.

Q. You have worked under Mr. Warden?

A. Yes, I have assisted him.

Q. You are now his superior?

A. I am now his superior, yes.

Q. You also worked in the technician department or as instrument technician the same as Mr. Newsom, is that correct?

(Testimony of Joseph L. Kalins.)

A. I did the same duties although I was a junior engineer at that time.

* * * * *

Q. When did you first observe or have any knowledge of any criticism of Mr. Newsom's work or of any lack of efficiency on his part?

A. I should judge possibly at the beginning of 1950.

Q. What occurred at that time?

A. I cannot answer in any one specific instance. I am thinking of general impressions that I gained at that time. [279]

Q. How did you gain that impression?

A. Certain things I must have overheard from Mr. Hardway and possibly from Mr. Warden.

Q. Was there anything you had observed?

A. Only in the nature of the man. He was capable of a good deal of good natured mischief. It is very difficult to supply any specific instances, however.

Q. When were any defects in his work made known to you? Of Mr. Newsom's work.

A. I knew there had been some difficulty toward May or June of 1950, however, I was not too very well versed with the specific instances involved. I do know there had been difficulty.

Q. When did these first come to your attention in such a way that you did know what difficulty there was?

A. Specifically, when I became efficiency engineer.

(Testimony of Joseph L. Kalins.)

Q. Tell us what happened.

A. At the time I became efficiency engineer, Mr. Warden——

Q. First, tell us about when that was.

A. That was at the beginning of September, 1950.

Q. All right now, tell us what happened.

A. Mr. Warden made several complaints. Complaints of difficulty in being able to do a type of work that he felt his crew should be capable of and the utilization of departmental standards, which is an item that can very well be defined. [280]

Mr. Warden made reference to general things in his difficulty in managing this young man. It was not until sometime later and before, possibly, the beginning of September that he brought me down to Silver Gate and showed me certain things that had been done on Unit 2 which had just been overhauled. I make mention of a specific instance where the gauges and thermometers were mentioned previously in our discussions here.

These gauges were put in, possibly, with no support in holes in the turbine base, possibly just one screw in one or two instances. The thermometers were dirty, for which I could see no excuse. There was one gauge which did have screws in it. In other words, the screws had been applied to the gauge, but they did not belong to that gauge. They had been taken out of the box which the maintenance force was using for certain pieces of equipment on their work.

(Testimony of Joseph L. Kalins.)

Rather than get the real screws, the ones that belonged in that gauge, which were in the instrument shop, he took these special screws in this box belonging in the maintenance force and put them in this gauge, which caused the maintenance force some difficulty when they were short of this particular item.

Q. Now, about that time did you have a conversation with Newsom about this complaint that had been made?

A. Yes, I felt the complaints made by Warden were of such strength that they could not be overlooked, particularly in view of the fact that I knew there had been difficulties previously. [281]

* * * * *

The Witness: Yes.

Q. (By Mr. Luce): You had a conversation with him about that time?

A. Yes, that was in the company of Mr. Warden.

Q. You and Mr. Warden and Mr. Newsom had a conversation? A. Yes.

Q. About what time was that?

A. I believe that was in the morning.

Q. Was it in September?

A. September the 18th, I believe.

Q. Tell us what was said at that conversation.

* * * * * [282]

The Witness: I told Newsom there was certain things we could not tolerate; that we knew him capable of better work than he was producing; that

(Testimony of Joseph L. Kalins.)

his work was sloppy and that he could cure that by diligently applying himself.

Further, that—I am mentioning the essence of the thing——

Trial Examiner Myers: Just take your time and think about it.

The Witness: There were many other things that were said, but I don't know if I can say exactly what I said.

Trial Examiner Myers: You were asked what was said by everybody, what transpired at this meeting, not just what you said.

The Witness: Well, Newsom wanted to know what the specific instances were, or the specific complaints were, and Warden related each of these things in turn for which Newsom had an answer regardless of what the situation was.

He excused every action that Warden accused him of and became rather excited about some of these things. I began to see there was no possibility of improving the relationship between the two and I asserted myself and said we cannot tolerate this sort of work in our department; that his relationship with his supervisors must improve; that his work must improve, and, if not, he would not be tolerated in the test department.

At this point he asked me what I meant by that and Warden interjected that that meant he would be through, he would be out; he would no longer be in the test department.

He was also advised that his work was going

(Testimony of Joseph L. Kalins.)

to be watched for a while and he said, "How long will my work be watched?"

And Warden said, "It will be watched for a month."

Trial Examiner Myers: Is that the sum and substance of what was said?

The Witness: Basically, yes.

Q. (By Mr. Luce): Now, where is your office located in relation to the place where Mr. Newsom performed his duties at about that time and thereafter?

A. My office has been at Station B and still is.

Q. Where did Newsom perform his duties?

A. Newsom at that time was at Silver Gate.

Q. Where was your office and where was his duties performed, generally, from there on?

A. From that time on he was at Silver Gate for the remainder of that year and most of the time —I do circulate between those stations. [284]

Q. Were there other complaints made in your presence by other officers superior to Newsom about the efficiency of his work after the September meeting? A. No, sir.

Q. You didn't have any discussions with anybody else about it?

A. I didn't quite understand your question before. Yes, we did have discussions, certainly.

Mr. Warden commented on it from time to time and on two or three occasions we had discussed Newsom in Mr. Hathaway's office.

Q. What was the general nature of these dis-

(Testimony of Joseph L. Kalins.)

cussions? In other words, were they complimentary to Newsom or were they uncomplimentary?

A. No, sir, they were not complimentary. We were posed with a problem to do something with this man. Ultimately, something would have to be done.

Q. Now, did you have any conversation with Mr. Newsom after this September conversation in regard to the quality of his work before the discussion of January 31st?

A. I don't believe so.

Q. Were you in Mr. Hathaway's office at the time the technicians were there and Mr. Warden was there on January 15th? A. Yes, I was.

Q. Will you state what occurred in your presence at that time? [285]

A. At that meeting in Mr. Hathaway's office, there was myself, Warden, Newsom, Fowler, Shroble and Webb; also Mr. Botwinis. Everyone was seated and Mr. Hathaway posed the question, "Who is the spokesman?"

Every one looked at the other one and someone voiced the opinion that there was no spokesman. As I recall, Fowler and Newsom spoke more than anyone else and I think either one of them may have started at approximately the same time, but both of them did most of the talking.

Mr. Hathaway asked the question, "Is there anything else involved other than money?" Or, "What is involved?"

And they replied, "Wages."

(Testimony of Joseph L. Kalins.)

He asked if there was anything else involved, and they said no, they were satisfied with all their working conditions.

Mr. Hathaway then told the men to consider what possible benefit they could gain from the union and to weigh that against the liberties and benefits they now had, which they might take for granted.

I don't seem to be able to recall anything else of importance just now.

Q. Was anything said in conclusion as to what would be done, either by Mr. Hathaway or the men?

A. The men thought they would have a meeting after this meeting in Mr. Hathaway's office and decide whether or not they would continue their case of trying to get into the union.

Q. Did you ever talk to the men after that meeting of January 15th and before the one of January 31st? A. I believe so. [286]

Q. Did you have any conversation with him in regard to this desire of theirs to join the union or their further conduct?

A. I can recall a conversation with Mr. Webb, wherein I asked him——

Q. Was Newsom present?

A. No, I don't believe I ever had a conversation with Newsom, not that I can recall.

Q. Up to that time, did you at any time have any or express any opposition to their activities in trying to have the union represent them?

A. No, sir.

Q. Do you think their activity or the activity

(Testimony of Joseph L. Kalins.)

of these men in trying to become a part of the union met with any objections on your part?

A. Absolutely none.

Q. Now, will you state what occurred at this meeting of January 30th, where the station chiefs met and I believe you were present. A. Yes.

Q. Will you state and tell us about that meeting? Who was present and what was said?

A. Mr. Hathaway, Mr. Zitlaw, Mr. Campbell, Mr. Warden and myself were present at this meeting. [287]

We prepared a proposed training plan for our instrument technicians, and after some discussion about the plan, it was unanimously decided that it would be accepted.

Then Mr. Hathaway posed the question how the instrument men were doing. Mr. Warden replied that all of them were doing well considering their experience and training with exception of Mr. Newsom. Mr. Hathaway then said, "We have a problem here, what shall we do with this man?"

Each man in turn, I don't recall the order in which they spoke, but each man in turn gave his idea of what he thought of Newsom's work, and after each man had expressed his opinion it was unanimously decided that the man—well, that is, not right—that we would be better off without him and that he should be removed from the department.

Q. Were his general qualifications, his efficiency and work discussed at that meeting?

(Testimony of Joseph L. Kalins.)

A. Yes, there were various points mentioned. We talked about the defectiveness of his work, the attitude of the man was stressed that it was not conducive toward harmonious relationships with other operating personnel, or the maintenance people——

Q. You say it was unanimously decided the company would be better off without him. Was any decision reached as to what they should do?

A. Yes, it was decided that we would take action immediately. [288]

Q. When you say it was decided, who decided it? Give us the language, if you can, of the person who stated it.

A. I can't remember any particular words or phrases.

Q. Well, in substance, what was said?

* * * * *

The Witness: Well, finally, the decision was this by Mr. Hathaway: That the department would be better off without him.

Q. (By Mr. Luce): Did Mr. Hathaway give you any instructions? A. Yes.

Q. Tell us what they were.

A. Mr. Hathaway instructed me to announce to Mr. Newsom on the following day that he would be given two weeks termination of employment.

Q. And what did you do? [289]

A. The next morning I had Mr. Warden bring Mr. Newsom down to Station B, to my office, at which time I read to Mr. Newsom certain notes

(Testimony of Joseph L. Kalins.)

that I had noted down on paper as the reasons for his discharge.

Q. Have you these notes with you?

A. I do happen to have these with me, sir.

Q. Will you produce them, please?

Trial Examiner Myers: You may step down and get them.

Q. (By Mr. Luce): I hand you, Mr. Kalins, some notes on a yellow sheet of paper headed "Newsom Discharge," and I will ask you to state what part of that page did you have before you and did you read from at the time you had the conversation with Newsom on January 31st.

A. Approximately two-thirds.

Q. Well, between what parts?

A. From here to here.

Q. That is from the top to the double line I am now drawing through? A. Yes.

Q. And no part of the second page?

A. No.

Q. Were the words at the top, "Newsom Discharge?"

A. No, that was written in subsequently.

Q. Were the words "Newsom Discharge," and "The Discussion with Newsom and Instrument Technicans, 1-31-51," added later on? [290]

A. Yes.

Q. Will you read now the part of this exhibit, proposed exhibit that you had before you that you read from to Mr. Newsom?

A. I read that we were not satisfied with his

(Testimony of Joseph L. Kalins.)

work as far as the cooperation with his supervisors; the quality of his work; the quantity of his work.

Breaking it down further, (1), does not have ability to get along with supervisors; (2), no desire to become a leadman, to set a pace for the other men or show leadership, does not produce in accordance with ability; (3), producing measured output to just barely get by; (4), unsatisfactory workmanship, sloppiness of work, uncompleted jobs, no dependability; (5), does not fit into department setup.

Q. When you showed that to Mr. Newsom, what did he say?

* * * * *

The Witness: He insisted the charges were not real, they were not true, and asked again for certain instances in which his work had fallen down. Once again, he was given some of these instances and finally he said that he would like for me to announce this decision before all the instrument men.

Q. Did he say why he wanted that done?

A. He wanted to put Warden on the carpet before the men. As near as I can remember that was the expression.

Q. What did you say to that?

A. I told him that I would arrange the meeting if I could. I obtained the permission from Mr. Hathaway and we did have a meeting on the fourth floor at Station B.

Q. When was that?

(Testimony of Joseph L. Kalins.)

A. That was the same day, January 31st, 1951.

Q. Will you state what occurred at that time?

A. Well, all the men arrived and I re-read those notes. Actually I didn't read them word for word, I referred to them as I spoke and announced it was my unpleasant duty to state these facts, but something had to be done to improve the departmental standards.

I invited anyone to ask questions or say whatever he thought. Mr. Newsom had a monopoly on the floor that morning and cited many childish instances of reasons why Warden did not like him. Mr. Warden, to his credit, sat by and contained himself while Newsom became rather riled and berated Mr. Warden's supervision.

Mr. O'Brien: I just don't know what to do about this. He has been cautioned several times.

Trial Examiner Myers: Try not to use these conclusions.

Mr. Luce: There might be some objection to the word "childish," but as to whether or not he became excited, that is a fact. [292]

Trial Examiner Myers: I have been trying to get the witness to tell us how he acted.

Mr. Luce: Counsel makes his objections in a rather——

Trial Examiner Myers: I overruled the objection. I think he has a right to say something that can easily be observed.

The Witness: There was not much said by the other men, but Mr. Fowler had the conclusion at

(Testimony of Joseph L. Kalins.)

the meeting and said something to the effect that the men were all together in this thing and that he felt in his own mind that the company possibly were trying to fire Newsom in order to break up their attempt to unionization. That they could, therefore, take it to the National Labor Relations Board.

Q. (By Mr. Luce): What did you say?

A. I told him it was his privilege if he so felt, but that I had done my duty as I saw it.

Q. About how long was it that Newsom criticized Warden and cited instances where he thought Warden was prejudiced against him?

A. I couldn't say, possibly an hour.

Q. Were all of his remarks directed to criticisms of Warden? A. Practically.

Q. And was anything said at that time by Newsom in regard to what he was going to do?

A. Newsom made a statement that he would take this to the National Labor Relations Board, if for no other reason——

Trial Examiner Myers: When did he say that? Before Fowler made his statement?

The Witness: Yes, it would have been before Fowler made his statement.

Newsom said that he would take the case to the National Labor Relations Board if for no other reason than the nuisance value of it.

Trial Examiner Myers: Did you ask him what he meant by that phrase?

The Witness: No, sir, it was quite clear.

Trial Examiner Myers: In what way?

(Testimony of Joseph L. Kalins.)

The Witness: From what I know about the man's attitude he would do just that.

Q. (By Mr. Luce): What was said at that time about his termination? [294]

* * * * *

A. We told Newsom he could transfer to some other department by making the appropriate application with the personnel department, but that his termination, however, in any case, would be in two weeks, which would be February 14th. We told him that he could resign without prejudice or, if he so chose, he would be discharged .

Q. What did he say to that?

A. He did not answer directly whether he would accept resignation, but he said he would tell us on the following day.

Q. Did he say anything about the question of transfer?

A. Apparently, he didn't consider it.

Q. Did he say anything about the question of transfer? A. Not to my knowledge.

Q. Then did he ever communicate with you again in regard to the termination of his employment? A. No, sir.

Q. You had no further conversation with him in respect to his termination?

A. Only on the last day. On February the 14th, in the afternoon, I came into the instrument shop where he was working. I told him that I wished him luck and that some day he would thank me for having terminated his service. That he would probably drive up in a Cadillac some day.

(Testimony of Joseph L. Kalins.)

I asked him what he intended to do, and he advised me he had lots of time and that he would prosecute his case through the National Labor Relations Board. [295]

Q. Was anything further said?

A. I don't recall just now. May I take that back? I do recall one item.

Q. What was that?

A. He assumed——

Trial Examiner Myers: No, not what he assumed. What did he say?

The Witness: He said, "When I come back to the company I won't do anything unless I get direct orders and very specific orders from Mr. Warden himself on just exactly what to do and what not to do."

Q. (By Mr. Luce): When was it that he made that statement?

A. February the 14th in the afternoon.

Q. Was there any change in the instrument technicians, the crew, after Newsom left?

A. We assigned Tony Botwinis to the instrument technicians.

Q. What I mean is was there any change in their efficiency or attitude?

A. Yes, the department as a whole was more capable, was more hard working, more harmonious and all around a much better department.

Q. Since Mr. Newsom left? A. Yes.

Q. From your knowledge of the department

(Testimony of Joseph L. Kalins.)
and of the men, did you attribute that to the fact that Mr. Newsom did leave? [296]
* * * * *

JOSEPH L. KALINS

a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Luce): Between September, 1950, and January, 1951, what was the situation in respect to the instrument technicians in regard to the work they were doing?

A. Well, as I recall, the work load on all of us, the instrument technicians as well as the instrument engineer and efficiency engineer, was considerable and we could not replace any man during that period without suffering some loss in our effectiveness. Nor did we have time to break another man in.

Q. What was the reason for that?

A. That was due to much test work and development work going on as the result of many years' fruition that was more or less concentrated in this period.

Q. Why concentrated in this period?

A. Many of these developments that have since been installed, projects of various nature, were all due—in other words, we had made the necessary arrangements and obtained the authority for these projects which kept myself and Mr. Warden very

(Testimony of Joseph L. Kalins.)

busy getting things ready for their installation, so we could not spend any time breaking in a new man.

Q. Was there anything else that kept your department occupied during that period?

A. Just the fact that we had a new machine with many things to work out. We called them the bugs, and also the failure of Unit 1 which brought about the overhaul of that machine at a time when we didn't particularly wish to work on it, although it was thrust upon us.

Q. Do you mean the burnout? A. Yes.

Q. When that burned out, what was required?

A. Since the entire unit was to be overhauled, very thoroughly, that is, not only the generator and the turbine and the boiler, but all of the other units, the instrument work would have to be very thoroughly overhauled so that it would be a very good operating machine when it came back into service.

Q. How long did the overhaul of Unit No. 1 take? [301]

A. As I recall, possibly——

Trial Examiner Myers: You mean approximately.

The Witness: Yes, approximately from the third week in September until the beginning of January, 1951.

Q. (By Mr. Luce): How long did it take for the overhaul of the instruments on Unit 1?

A. It went on all during that time.

(Testimony of Joseph L. Kalins.)

Q. Was Mr. Newsom's inefficiency discussed with Mr. Hathaway at any time other than this meeting of January 30th?

A. Yes, from the September meeting, and on through to January we discussed it two or three times in Mr. Hathaway's office.

Q. Was there any plan or course outlined or decided upon at these meetings?

Mr. O'Brien: I think I will have to object. I think we should fix the time, place and who was present.

Trial Examiner Myers: I overrule the objection. I will allow the witness to answer. Yes or no?

The Witness: Yes, approximately from the third week of September until the beginning of January, 1951.

Q. (By Mr. Luce): The overhaul of the instruments, how long did that take?

A. It went on all during that time.

Q. Would you say that Mr. Newsom's inefficiency was discussed with Mr. Hathaway at any time other than this meeting of January 30th?

A. Yes, from the September meeting on through to January we discussed it two or three times in Mr. Hathaway's office.

Q. Was there any plan or course outlined or decided upon at these meetings?

Mr. O'Brien: I think I will have to object. I think we should fix the time, place, and who was present.

(Testimony of Joseph L. Kalins.)

Trial Examiner Myers: I will recommend that he do it.

The objection is overruled. Yes or no?

The Witness: Yes.

Q. (By Mr. Luce): Will you tell us what occurred at these meetings?

Trial Examiner Myers: Fix the date.

Q. (By Mr. Luce): Approximately when was this held and who was present?

A. Probably in October——

Trial Examiner Myers: You mean about October?

The Witness: About the month of October——

Q. (By Mr. Luce): Let's take the first one in October. Is that 1950?

A. Yes, that is 1950.

Q. Tell us what occurred at that meeting and who was present.

A. At this meeting, Mr. Hathaway, Mr. Warden and myself were present. We discussed in a very general manner the difficulty involved. We merely procrastinated, we put off the date on which we would take action. [303]

Q. What was said by Mr. Hathaway and the rest of you?

A. Mr. Hathaway asked how Newsom was doing, and Mr. Warden's reply was that he was not satisfied with his work. I don't think I had too much to offer in any of these meetings.

Q. When was the next meeting?

(Testimony of Joseph L. Kalins.)

A. Either in November or December, I can't place it.

Q. Do you recall who was present?

A. Mr. Hathaway, Mr. Warden and myself.

Q. Tell us what was said.

A. Essentially the same as happened at the meeting before. Mr. Hathaway was asking how Newsom was progressing and if he had improved his relationship with the superiors. Mr. Warden again replied in the negative.

Q. Was anything further said by Mr. Hathaway?

A. Mr. Hathaway expressed some concern over the situation.

Trial Examiner Myers: What was said?

The Witness: I can't remember.

Trial Examiner Myers: Of course, you can't remember, but just tell us the sum and substance.

The Witness: Well, he said we should be taking action but that it was up to Mr. Warden and myself. We replied that we were waiting until a more opportune time.

Q. (By Mr. Luce): Did you say why that particular time was not opportune? [304]

A. Simply because our work load was too great.

Trial Examiner Myers: Did you say that?

The Witness: Yes.

Q. (By Mr. Luce): Did you have another meeting before the January 30 meeting with Mr. Hathaway?

A. I can't recall if there were two or three.

Q. Did the instrument men ever speak to you

(Testimony of Joseph L. Kalins.)

about wishing to join the union at any time prior to the January 15th meeting? A. No, sir.

Q. Do you remember at any time saying to any of them that their jobs would be in jeopardy if they continued their union activities?

A. Absolutely not.

Q. Did you say anything similar to that?

A. No, sir.

Q. Did you, yourself, have any reason or did you object to their joining the union? A. No, sir.

Mr. O'Brien: I will have to object.

Trial Examiner Myers: Overruled.

Mr. Luce: You may cross examine.

Trial Examiner Myers: Mr. O'Brien, do you have any questions of this witness?

Cross Examination

Q. (By Mr. O'Brien): Mr. Kalins, when you had this first talk with Mr. Newsom on January 31, 1951, you had a yellow sheet of paper in front of you with certain notes on it? A. Yes.

Q. Was that exactly the same sheet of paper you had yesterday? A. The same.

Q. No changes were made on it at all?

A. There were additions noted at the top. Shall I tell you what they are?

Q. I want to know if it is the same sheet.

A. The same sheet.

Q. Did you read that off to Mr. Newsom?

A. Not word for word. I just referred to it as I spoke.

(Testimony of Joseph L. Kalins.)

Q. You didn't read it off the same as you did yesterday? A. No.

Q. When did you prepare that list?

A. I prepared that prior to the time Mr. Warden brought Mr. Newsom to my office.

Q. It was after your talk with Mr. Hathaway?

A. Yes.

Q. Did you consult with anybody in the preparation of that list? A. No, sir. [306]

Q. You heard Mr. Warden testify that Mr. Hathaway met approximately every week with the station chiefs? A. Yes.

Q. Did you regularly attend these meetings?

A. No, sir.

Q. How did you happen to attend the meeting on January 30th?

A. I obtained permission by calling Mr. Hathaway.

Q. When did you obtain that permission?

A. Early that morning.

Q. On the morning of the meeting?

A. Yes.

Q. Did you tell Mr. Hathaway why you wanted to be there? A. Yes.

Q. What did you say to him?

A. I told him I wished to discuss our training program and also to discuss Mr. Newsom.

Q. Had you discussed this training program previously with Mr. Hathaway?

A. Only in very general fashion. I explained the need for it.

(Testimony of Joseph L. Kalins.)

Q. Did you say you saw no need for it?

A. No, I explained the need for it.

Q. On the telephone to Mr. Hathaway?

A. No, at personal sessions from time to time.

Q. What explanation did you give him? [307]

A. The fact that the men were very green and that our equipment at Silver Gate was of such size and complications that the men were not equipped to be able to handle that sort of thing.

Trial Examiner Myers: What men?

The Witness: The instrument men.

Q. (By Mr. O'Brien): Did you outline what the plan would comprise to Mr. Hathaway?

A. When?

Q. In your conference with him on the morning of the 30th. A. In some detail, yes.

Q. What did you say to him about the plan on the morning of the 30th?

A. We spoke about the type of training it was to be, how often the sessions were to be, and the length of time involved.

Q. What proposals did you make and what did you have to say about it?

A. I proposed that we take each of the types of equipment manufactured basically by Bailey Meter Company, our biggest instrument suppliers, and break them down one at a time and go through the various steps in the understanding of the equipment.

Finally, to the over-all understanding as to how

(Testimony of Joseph L. Kalins.)

the pieces of equipment fit together and trouble-shooting. [308]

Q. Did you say you discussed the possibility of sending some of these men to school?

A. Yes, I tried to obtain permission to do that.

Q. Did you describe the possibility of bringing in the manufacturer's representative or outsiders?

A. No sir.

Q. Did you describe the time when the training would be conducted? Whether it would be on the employee's own time? A. Yes.

Q. What was your proposal?

A. My proposal was to use so much company time as we could spare and then use some over-time in addition.

Q. You made that proposal to Mr. Hathaway?

A. Yes.

Q. At the meeting? A. Yes.

Q. What did he say?

A. He was agreeable to the plan as presented.

Q. Was it Mr. Hathaway's discussion that you present the plan to the station chiefs?

A. Well, sir,—you asked me a slightly difficult question. I can give you the essence of it.

Q. If you would.

A. The reason was the fact that both station chiefs would be present and their ideas would be incorporated in this thing. [309]

Q. Was the plan formulated in detail at this meeting?

(Testimony of Joseph L. Kalins.)

A. Only in general. The actual details were up to Mr. Warden and myself.

Q. Did you and Mr. Warden have authority to hold your men overtime for this training program?

A. Mr. Hathaway gave us that permission.

Q. Did Mr. Hathaway have to consult with anyone else before he gave you that permission?

A. I don't believe he did.

Q. So at this meeting you decided that you would have two days a week training. One hour on the employees' regular working time and one hour overtime? A. That is correct.

Q. That amounted to approximately how much added income for each employee?

A. I don't know.

Q. That would be $4.00 per week?

A. One hour overtime—it would be about $5.00 a week.

Q. What was the regular rate for an instrument technician?

A. I believe it is $1.67½ an hour, which would be $2.50, and two hours a week would make $5.00.

Q. About $5.00 a week?

A. Approximately.

Q. For each employee. [310] A. Yes.

Q. Calling your attention to September, 1950, had you ever had any supervisory job before you got your present position?

A. I was an officer in the United States Air Force for four years.

Q. No industrial supervision?

(Testimony of Joseph L. Kalins.)

A. Yes, I have had some.

Q. Had you ever had occasion to reprimand or discipline an employee before you obtained your present position?

A. In the Army I had that regularly.

Q. I am not talking about the Army. That is something entirely different.

A. In industrial organizations, I don't think so.

Q. Do I understand that shortly after you obtained your present position that Mr. Warden came to you with indefinite complaints about Newsom?

A. Not indefinite. He came to me with very definite complaints.

Q. Whatever they were, you told Mr. Warden "when you get something on him you come to me"?

A. I told him when he reached the point where it was serious enough I would go down and talk with him.

Q. It didn't seem serious enough for you when Mr. Warden presented it that you didn't take any action?

A. Let's say I couldn't afford the time.

Q. Did you tell Mr. Warden you couldn't afford the time?

A. Yes, I had too many other irons in the fire.

Q. So that the next time Mr. Warden comes to you it is about these dirty faces, is that right?

A. That and others.

Q. Well, what did Mr. Warden say—"Now, I have got something"?

A. No, we don't do that to any employee.

(Testimony of Joseph L. Kalins.)

Q. What did he say?

Trial Examiner Myers: The question is, "What did he say"?

The Witness: He said, "I have something I would like to show you about Newsom's work on Unit II."

Q. (By Mr. O'Brien): Then you went and looked at these dials and thermometers——

A. And gauges.

Q. When did you find out that Mr. Newsom, or the men that were working with him, took some screws from the maintenance men's box?

A. At that time.

Q. How did you find that out?

A. Mr. Warden related that to me.

Q. So Mr. Warden had already made an investigation before he brought you down there?

A. That is right.

Q. Was this after regular working hours?

A. No, sir. [312]

Q. Were there any instrument technicians around?

A. There were some working on the boiler panel.

Q. Was Mr. Newsom present?

A. He was on the operating floor at the time, yes.

Q. He was working at some other job?

A. Yes.

Q. When you called this meeting, was that in your office?

A. No, sir, that was in Mr. Warden's office.

(Testimony of Joseph L. Kalins.)

Q. On what date, again?

A. As close as I can remember, September 18, 1950.

Q. That would have been before the overhaul started of Unit I, would it?

A. Yes, it would.

Q. And I think you said your intention in calling this meeting was to get to the bottom of the difficulty, if any? A. Definitely.

Q. As the meeting progressed, Mr. Newsom defended himself rather vigorously?

A. Very much so.

Q. Is it just possible you might have become a little angered yourself?

A. I became impatient.

Q. You didn't think that Mr. Newsom was showing the right attitude? A. Definitely not.

Q. All he actually did was explain as vigorously as he could what he had done? A. Yes.

Q. What do you thing he should have done?

A. Shall I tell you what I would have done?

Q. All right.

A. If my boss told me about certain difficulties or certain errors that I had been making, whether I did it or whether he was right or wrong, I would certainly try to improve the quality of my work.

Secondly, I would try to avoid the sort of thing that he mentioned as being wrong.

Q. So if Mr. Newsom had said, "I am sorry. I will try to do better," you would have been happy? A. No.

(Testimony of Joseph L. Kalins.)

Q. I am trying to get what you expected of Mr. Newsom. You asked him a question, he gives you an answer and you get annoyed at him.

A. No, sir.

Q. What did you expect?

A. I expected certain comments, no doubt; however, I don't expect that in every case he would be right. [314]

* * * * *

Q. (By Mr. O'Brien): I think you said it was in January, January 30th, that you received instructions from Mr. Hathaway to discharge Mr. Newsom? A. Yes, that is right.

Q. Did Mr. Hathaway say it would be all right if Mr. Newsom transferred to some other department, at this supervisors' meeting?

A. I believe that is true.

Q. Did Mr. Hathaway tell you that you suggest to Mr. Newsom that he transfer to some other department? A. It was not stressed. [315]

Q. I wondered if it was said.

A. I believe that is true.

Q. What I am getting at is whether the transfer to some other department was Mr. Hathaway's idea or your idea.

A. It was just an idea. That was not my idea. It was an alternative offer at that time.

Q. Aside from your supervising instrument technicians, you have clerks under your supervision, engineering students, do you not?

A. Not at present.

(Testimony of Joseph L. Kalins.)

Q. At that time?

A. I had many departments under me, yes.

Q. In some of these departments would Mr. Newsom's experience and training qualify him for a job or a position? A. It might have.

Q. Now, assuming that you had a position in some place other than the instrument department, which Mr. Newsom would be qualified by training and experience, would you have taken him?

A. With a proper attitude, I am sure I would have.

Q. You would want to make sure that his attitude changed before you took him?

A. There was no question that he wouldn't accept anything else.

Q. You didn't offer him anything else? [316]

A. No, sir.

Q. And you would have had some hesitation about taking him under your direct supervision?

A. In view of what I experienced, yes.

Q. You say the station chiefs concurred in the unanimous decision to discharge Mr. Newsom?

A. Yes.

Q. The station chiefs have charge of all operations and maintenance at their respective stations, do they not? A. Yes.

Q. So they would have to approve the transfer of Mr. Newsom to the production or maintenance work at one of these stations?

A. I believe that is correct.

(Testimony of Joseph L. Kalins.)

Q. And Mr. Hathaway is in charge of all the engineering work of the company?

A. Mr. Hathaway is in charge of the electrical production department.

Q. I am not talking about your gas production or your field production. Mr. Hathaway didn't suggest to you that there might be some job for Mr. Newsom in some other department under his supervision? A. No, sir.

Q. I think you said in one of your interviews with Mr. Newsom that you urged him to resign so that he could get his vacation pay? [317]

A. No, sir.

Q. You didn't? A. No, sir.

Q. Did the matter of vacation pay come up in any of your meetings with him?

A. In the January 31st meeting it was explained to him that if he resigned he would be entitled to his vacation pay.

Q. And why would be not be entitled to his vacation pay if he were discharged?

A. That is the company rule.

* * * * *

Q. (By Mr. O'Brien): You said you had a conversation or overheard a conversation between Mr. Warden and Mr. Hathaway where Mr. Newsom was discussed? A. Very little.

Q. Did it just come up casually or was it a special meeting about Mr. Newsom?

A. They were not special meetings, no.

(Testimony of Joseph L. Kalins.)

Q. You had other things to discuss and Mr. Newsom's name [318] came up?

A. Mr. Newsom's case was one thing we wanted to discuss.

Q. Did you discuss any of the other instrument technicians? A. There were no complaints.

Q. Did you discuss them?

A. We discussed the progress of some of the men.

Q. That is whether you thought they were making good progress, whether they were weak in some spots and whether they were improving?

A. That is right, we talked about all the men from time to time.

Q. You talked about all the men when you got together? A. That is right.

Q. There wasn't any particular incident that would help you to fix the time of the October conversation? Or the November or December discussion when Mr. Newsom's name came up?

A. I could probably pick them out of the log if I looked.

Q. There was nothing fixed in your mind, nothing outstanding? A. No.

Q. Don't you have a practice of overhauling each turbo-generator unit at least once a year and overhaul all the instruments on it?

A. That is correct.

Q. How much time do you normally allow for an overhaul on one generator turbine?

A. If it is a major overhaul we spend consider-

(Testimony of Joseph L. Kalins.)

able more time. It is the time limitation that determines how thoroughly we work.

Q. That is, an older piece of equipment might take relatively longer?

A. They are all relatively new there at Silver Gate.

Q. Do any of these overhauls occupy less than a month in time? I am talking about the overhaul of just one unit?

A. Will you repeat the question, please?

Q. Has one unit been overhauled in less than one month?

A. I am not sure I know the answer, but that is possible. It is probably true that it has been.

Q. You have three units at Silver Gate and two at Station B?

A. No, sir, Station B has a number of turbines with an entirely different arrangement than at Silver Gate. They are all interwoven and interconnected, whereas at Silver Gate they are all separate.

Q. The thing that disturbs me is how you would be able to complete them all if it took four months to overhaul one unit.

A. That is an unusual situation.

Q. That is because I think you had to send back for parts to Schenectady?

A. No, sir, we had to send for a lot of equipment by air express and anything else to put that generator back in shape. [320]

* * * * *

(Testimony of Joseph L. Kalins.)

Redirect Examination

Q. (By Mr. Luce): Counsel inquired of you in regard to Newsom's attitude. Now, did his attitude have something to do with your decision to urge his discharge?

A. Very much so.

Q. What was that attitude? Will you describe it and give instances?

A. Well, basically, it is a defensive attitude. You can hardly show the man where he has done something wrong where he will not have an answer or some excuse. The man was not open to criticism at all.

Q. What was his attitude towards the persons who criticzed him?

A. I think he was fairly contemptuous of Mr. Warden.

Q. What did he say in regard to Warden's criticisms in your presence?

A. I could relate something on the January 31st meeting that might point up that thing.

Q. Was that the same kind of a statement he made in September?

A. Possibly somewhat similar, if not to the same extent.

Q. I would rather you tell us what he had done before the January 30th meeting that showed his attitude with respect to Mr. Warden.

A. Well, in the September meeting each of the things that Warden mentioned as the various alle-

(Testimony of Joseph L. Kalins.)

gations, these complaints, in his reply he would—it was just the way his reply was made. He had contempt in his voice and I don't know how else I can say it.

* * * * *

CHARLES R. HATHAWAY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Luce): Mr. Hathaway, what is your present position with the San Diego Gas and Electric Company?

A. Superintendent of electrical production.

Q. How long have you been in the employ of the San Diego Gas and Electric Company?

A. A little more than ten years, about ten and a half years.

Q. Will you tell us what your position was when you started?

A. I started as efficiency engineer about December 1, 1940. I became assistant superintendent in 1946, March of 1946, and superintendent October, 1947. I believe that was December 1, 1947. [323]

Q. And your duties as superintendent of production are what, briefly?

A. They are supervisory. I work with the two station chiefs and efficiency engineer in supervising the operation of the department.

(Testimony of Charles R. Hathaway.)

Q. Now, I will ask you, Mr. Hathaway, what training you had or education before you went to work with the San Diego Gas and Electric Company.

A. I am a mechanical engineer and I had service with the Southern California Edison Company and with the Miami Copper Company before coming to the San Diego Gas and Electric Company.

Q. Will you tell us when you first heard of any complaints against Mr. Newsom and from whom?

A. Complaints were brought to me by Mr. Campbell and the report had come to him from the operators and the men in the maintenance department in the plant.

Q. About when was that?

A. Early in 1950.

Q. Now, Mr. Hathaway, what were the nature of these complaints?

A. He said that the work was not being done as well as it had been done and the men were losing faith in the instruments.

I believe there was some mention of horseplay on the job by the men rather than working on the instruments.

Q. Was anything said at that time about Mr. Newsom or his work? [324]

A. I investigated by calling Mr. Hardway, who was in charge of the instrument men, and he told me that Mr. Webb and Mr. Newsom were working on instruments in Station B.

We discussed the matter and decided to make some changes so that the men would be separated.

(Testimony of Charles R. Hathaway.)

Q. Were the changes made? A. Yes.

Q. When did you next hear any complaints?

A. I spoke to Mr. Hardway several times after that asking him how he was doing. In each case he said he would do all right after discussing the matter with him, but that his work would then become lax and he hoped eventually he would realize the situation and make a good man.

Q. Did anybody complain about Mr. Newsom after he was transferred to Silver Gate?

A. Yes. Mr. Zitlaw, who is station chief at Silver Gate, told me he had several complaints about the work done by Mr. Newsom.

Q. What did you do?

A. I called Mr. Kalins, who was efficiency engineer, and asked him about it and he made an investigation.

Q. Who was this? A. Mr. Kalins?

Q. And that was about when?

A. That was probably several months after Mr. Newsom was transferred to Silver Gate. I don't remember the date. [325]

Q. Now, was any report given to you after Mr. Kalins investigated the matter? A. Yes.

Q. By whom?

A. Mr. Kalins and Mr. Warden.

Q. What did they tell you?

A. They said that—first, I asked him if he had tried different combinations of men as was suggested by Mr. Hardway. He stated that Mr. Webb's work had been on a high plane since the first

(Testimony of Charles R. Hathaway.)

trouble, but that Mr. Newsom had given trouble on every combination.

There has been no doubt as to Mr. Newson's ability, it is just that it is of no value to use unless it is used.

Q. Were there other complaints which came to you after these that you have now described?

A. No others were brought to me except when I asked for them, except as was brought up in our regular meetings.

Q. Aside from the meeting of January 30th, were there complaints brought to you by Mr. Warden and Mr. Kalins?

A. They weren't brought to me except on my request. * * * * * [326]

Q. (By Mr. Luce): Will you tell us about the conversation with Mr. Kalins and Mr. Warden? How did they come about and about when they were and who were present?

A. Following Mr. Zitlaw's—you mean, starting at the beginning?

Q. Yes.

A. Following Mr. Campbell's statement to me that there was trouble in the instrument group?

Q. Yes, and following Mr. Zitlaw's complaint.

A. Following Mr. Zitlaw's complaint, I talked to Mr. Kalins and told him I would like to discuss the matter with him and Mr. Warden.

Q. Give us about the date, if you can.

A. I couldn't tell you the date. It was in the period in which Mr. Newsom was at the Silver

(Testimony of Charles R. Hathaway.)

Gate Station and had been there maybe two months.

That would place it around the first of the year, early in the year. I asked Mr. Warden and Mr. Kalins how Mr. Newsom's work was progressing and the answer was it was not too satisfactory.

Each time the matter has been discussed with Mr. Newsom he made an effort to do better work and do more work; however, that lasted only short periods, and following the short period of good he would relapse into a period of not enough work work and not good enough work.

Q. How many times do you think before January 30th you discussed Newsom with Mr. Kalins and Mr. Warden?

A. Probably two, maybe three. My memory is a bit vague on the number of times, but the pattern was quite similar in each case.

Q. That is, practically the same thing was said each time? A. Yes.

Q. Now, you had a meeting on January 15th, did you not, at which the instrument men were present? A. Yes.

Q. Will you tell us the circumstances of that meeting, how it was called and who was present?

A. It was called at my request when I learned that the instrument men were planning on asking for representation by the union, and the meeting was in my office. Those present were Mr. Kalins, Mr. Warden, the instrument group, and Mr. Botwinis, who was working with them.

(Testimony of Charles R. Hathaway.)

Q. Will you tell us what transpired at that meeting? A. What was that?

Q. Will you tell us what transpired at that meeting?

A. Yes. When the meeting assembled, I asked the instrument men who was the spokesman for the group. There was a moment's hesitation and several spoke and said that no one had been chosen.

I asked them why they desired to join the union and they told me it was to obtain more money. I asked if there was any other reason and they said there was no other reason. In fact, I think I asked the question twice to be sure.

Our operations are based on mutual understanding between the men and the supervisory group, and I felt it was only fair——

Q. We just asked you about the conversation. What occurred at that meeting and what was said?

A. They told me the only reason they wanted to join the union was to obtain more money. I asked them why they had not presented the case to us, Mr. Warden, Mr. Kalins, and to me, and they said they believed they would have a better chance to get the money by going through the union than by going through the supervisors.

I explained that my own personal opinion was that actually their chances would be greater because the union negotiations would not have come up until January or February of 1952, at which time they would be the first to discuss this. I didn't mention this, however.

(Testimony of Charles R. Hathaway.)

I told them as far as I was personally concerned it didn't make much difference whether or not they were in the union because, after all, well over half of the men working for the company belonged to the union.

Trial Examiner Myers: Just keep to the conversation.

The Witness: That was mentioned, however, I said the company might have objections to them joining the union because of the nature of the job, but that that was a question between the company and the union and I didn't have an answer on it.

Q. (By Mr. Luce): What did the men say?

A. I also asked them to think this matter over very carefully and be sure they wanted to join the union before they did so. I also pointed out that there were certain advantages and certain privileges that they now enjoyed which they would not enjoy if they joined the union and operated under a strict contract.

Q. What did they say?

A. They said they wished to think the matter over and would give an answer at that time.

Q. Was that the end of the meeting?

A. As I remember it, yes. [330]

* * * * *

Q. Tell us what occurred at the meeting of January 30th.

A. That was a weekly departmental meeting which is usually attended by the station chiefs and me. We frequently call in other members of

(Testimony of Charles R. Hathaway.)

the supervisors and in this case Mr. Warden and Mr. Kalins were present.

Q. Tell us what occurred and what was said.

A. Mr. Kalins and Mr. Warden presented a program for training of the instrument men. They told me the need for this training and the thing was discussed in open meeting from various angles: The time allotted to the meetings, who should be instructors, and what type of instruction should be given. [331]

It was finally decided that the presentation as Mr. Kalins gave it was substantially correct and we would proceed accordingly. It called for two meetings a week, one hour on company time and one hour overtime.

At that time Mr. Newsom's name was mentioned following a question of mine as to how the men were getting along, how they were doing. Each man was given a brief consideration, and Mr. Newsom was reported as not doing satisfactorily.

The question was then raised as to whether or not——

Q. Wait a minute. Tell us what was said about his work and who said it.

A. As I mentioned, I asked about each man in the group and I asked about Mr. Newsom, as to whether or not his work was satisfactory following the occurrences in the past. The answer was that it was not satisfactory and he would probably never become a satisfactory instrument man.

Q. Who said that?

(Testimony of Charles R. Hathaway.)

A. I think I asked Mr. Kalins and Mr. Warden, and they both said that. I asked the opinion of the two station chiefs and they also agreed that he would not become a satisfactory instrument man and should not be in the training course which was about to start. That was also my opinion.

Q. Go ahead and tell us what was said.

A. That is what was said. Each man expressed his opinion that Mr. Newsom was not a satisfactory man and we should not waste his time or the time of the other men or the training instructors in the course. We could not leave him out of the course as an instrument man, and as we had decided something would have to be done about him, we took that action at that time.

Q. Was anything else said?

A. Substantially, that Mr. Newsom would be terminated; that he should be offered the opportunity of transfer, or, in case he didn't choose either——

Q. Will you tell us what was said and who said it? Don't give us your conclusions that it was decided. Tell us what was said and how the meeting terminated.

A. I asked each man, "Should we terminate Newsom?" That was the substance of the question. I asked them individually. The answer was also given, individually, that we should. I concurred with that myself.

I instructed Mr. Kalins to give Mr. Newsom a notice to that effect.

(Testimony of Charles R. Hathaway.)

Q. What was said about transfer at that meeting?

A. I am not sure whether I said it at that meeting or later, but I did mention that he would be eligible for transfer if he so wished.

Q. Have you had any experience under your supervision or within your knowledge of transfers from one department to another in the company?

A. Yes. [333]

Q. Will you give us the procedure and how it is handled and what your experience has been?

A. The procedure is the man who desires transfer usually requests his superior for permission —not permission to transfer, but to obtain the information relative to transfer, to approach the personnel department to obtain the proper blanks for transfer.

Sometimes it is just out of one department for any opening that may appeal to him. Other times it is for a position that is just open. The company policy is to post jobs that are open, and anybody in the company can bid on the job. When a man bids on the job the supervisor in that department reviews all of the names and interviews the men. He chooses the one whom he feels is satisfactory for that job.

I have had a lot of cases in that manner. We have received in this department men who have transferred from other departments and we have also lost men to other departments by transfer.

Q. When you mentioned to Mr. Kalins Mr.

(Testimony of Charles R. Hathaway.)

Newsom should be given the privilege of applying for a transfer, did you at that time entertain any objections to his transferring to any department.

A. No. Mr. Newsom's ability has never been questioned. It is just his application of that ability. We had hoped that by changing the nature of his work that he would be sufficiently interested in it to do a satisfactory job.

Q. If he had applied for a transfer, have you in mind any reason why you would have objected to the transfer?

A. I would have been questioned by the supervisor of the department to which he would have transferred, and I would tell him the truth about his history. This has happened in the past a number of times.

Q. Did you have any objections, as an employee of the company or as an officer of the company, to these instrument men joining the union or designating the union as their negotiating agent?

A. As an individual, who has served as an instrument man, myself, I felt as the men would feel, definitely. As a supervisor in the company, I had no objection at all. However, I did mention that the company had certain reservations because of the nature of the work, but that was not my reaction to the situation.

Q. Did the fact that Mr. Newsom was one of those seeking admission to the union have any

(Testimony of Charles R. Hathaway.)

effect at all on your decision to either allow him to transfer or terminate his employment?

A. It had no effect on the decision except when the union matter was brought up we thought the question might arise.

Trial Examiner Myers: What question?

The Witness: The question of whether it would have anything to do with the action. We discussed it in the meeting and decided to wait until the plans were completed. Then we decided, in all fairness to Newsom and the other members of the instrument group, that we should go ahead as if the union matter had not been brought up, which we did.

Trial Examiner Myers: Did you discuss the question of Mr. Newsom's union activity prior to this meeting of January 30th with anybody connected with management?

The Witness: Prior to that meeting I was not acquainted with Mr. Newsom's part in the union negotiations.

Trial Examiner Myers: You knew they had applied?

The Witness: I knew they had applied, but I didn't know who organized it.

Trial Examiner Myers: I am not picking him out, but did you discuss with anyone, prior to this meeting of January 30th, Newsom and the union and what you were going to do with respect to discharging Newsom because of the union question?

(Testimony of Charles R. Hathaway.)

The Witness: I don't remember.

Trial Examiner Myers: I mean, did you talk to anybody at all in management, outside of the division of chiefs?

The Witness: I acquainted my superior with the fact they were seeking union representation.

Trial Examiner Myers: Who is your superior?

The Witness: Mr. Noble.

Trial Examiner Myers: Did you discuss with him that you had in mind discharging Mr. Newsom?

The Witness: Yes, I believe I did.

Trial Examiner Myers: What was that discussion?

The Witness: I told Mr. Noble these men had discussed representation by the union and that one of these men had not been satisfactory as an instrument man; that we had definitely decided that he was not good and would probably ask him to terminate.

I asked him whether I should postpone the action until the end of the union negotiations or whether I should go ahead and act exactly as if the union negotiations had not been brought up.

Trial Examiner Myers: When was this?

The Witness: Sometime between January 15th and January 30th.

Trial Examiner Myers: All right.

Q. (By Mr. Luce): Did Mr. Noble at any time advise you or instruct you to terminate Mr. Newsom's employment?

A. Yes. He said if the man's work was not

(Testimony of Charles R. Hathaway.)

satisfactory, by all means to terminate him. He left the judgment up to the department, however, as to whether he was satisfactory.

Q. And did you refer to his union activity as any reason why he should be terminated?

A. No.

Q. Mr. Hathaway, you say, then, in your department a large portion of the men are members of the union? A. That is correct, yes.

Q. Is there any reason that you know of now, either in company policy or in your policy, that would require you or would cause you to discharge a man because he was engaged in union activity?

A. Certainly not.

Q. To your knowledge, has it ever been done by your company?

A. It has not been done since I have been with the company, certainly not.

Q. Has there ever been any discouragement given to the men to discourage them from joining the union? A. No.

Q. Would you say that in deciding to terminate Mr. Newsom's employment that his union activity was in any degree a contributing factor?

A. No, it was not.

Q. Mr. Hathaway, from your information that you had obtained from your assistants, the station chiefs, Mr. Kalins, Mr. Warden and anyone else, did you form or have an opinion as to whether or not Mr. Newsom was of value to the company, or as to what his value was?

(Testimony of Charles R. Hathaway.)

A. Yes, I formed an opinion.

Q. Would you give us that opinion?

A. My opinion of Mr. Newsom was that he is an intelligent young man and above the average. He has certain capabilities, but that on this particular job he was not applying these abilities and was not doing the work as it should have been done.

* * * * *

Q. What has been the report in regard to the efficiency of this particular group of instrument technicians since Mr. Newsom left?

A. I discussed that question with Mr. Kalins some time after Mr. Newsom left the group, and he told me the harmony and the work and everything was a great deal improved.

I also contacted the station chiefs in that matter and received the same answer.

Q. Mr. Hathaway, what would you tell us about the importance of the work of the instrument technicians?

A. Instrument technicians' work is very important in that they control the operations of the nervous system of the production of the electricity for the community. While they don't handle the major equipment, they handle the equipment that is used to determine the proper operation.

The operation itself is automatically controlled, which also does the operating of the largest unit in the system, so it is important that they are properly calibrated and in proper operating order.

(Testimony of Charles R. Hathaway.)

Q. What would you say were the requirements as to the attitude and co-operation of men in that department?

A. An instrument man is more or less in a key position in that he must not only do his work well and keep the instruments in perfect working shape, but must coordinate his effort with the operating men and the maintenance men, as well as the supervisors.

It requires a man of good personality, as well as good technical training. It is definitely a very important position. [340]

* * * * *

Cross Examination

Q. (By Mr. O'Brien): Mr. Hathaway, you said you had one complaint from Mr. Campbell relative to horseplay at Station B.

A. His one complaint was a collection of various complaints brought to me.

Q. He came to you once?

A. Yes, he came to me once.

Q. But Mr. Campbell didn't tell you who it was?

A. Yes, he said it was instrument technicians.

Q. He didn't mention their names?

A. I am not sure whether he did or not, but the two men involved were Webb and Newsom.

Q. You spoke to Mr. Hardway and Mr. Hardway was the one who said it was Webb and Newsom? A. Yes.

(Testimony of Charles R. Hathaway.)

Q. Do you know them both?

A. Certainly.

Q. You get around there in your capacity as production superintendent and know all of the instrument technicians? A. Yes.

Q. So when Mr. Campbell said there was horseplay, you didn't have to ask who it was, you knew?

A. I don't know whether I knew. Mr. Hardway separated them.

Q. And there was no further complaint of horseplay by either one?

A. I can't say that there was not.

Q. There were no complaints to you?

A. From Mr. Campbell, no.

Q. Or from anyone else about horseplay?

A. Yes, I think so.

Q. You think so? Tell us what it was.

A. Mr. Zitlaw told me, in consideration of Silver Gate, that not only was the work not being done, but the men were engaging in certain horseplay —Mr. Newsom was.

Q. What horseplay? [342]

A. I didn't go into that. Mr. Zitlaw's opinion is of value to me and I don't have to go into detail.

Q. Mr. Zitlaw's complaint was general, was it?

A. General and specific. The specific part of it was as to the work that wasn't being done.

Q. The specific part of it was that the instrument technician was requested to do work that was no part of his job?

(Testimony of Charles R. Hathaway.)

A. I don't understand.

Q. The instrument technician was asked to do some work by the station chief?

A. That was only a small item.

Q. What was the big item?

A. He wasn't getting the job done.

Q. What part of the job?

A. It was being done so slowly that the work wasn't being acomplished.

Q. How many technicians were there at Silver Gate at that time?

A. I am not sure. I don't know the division of the work at that time.

Q. At the time of Mr. Zitlaw's complaint, did you know where Mr. Warden was?

A. Mr. Warden was in charge of both plants and most of the time at Silver Gate. He was probably at Silver Gate at that time. [343]

Q. So the complaint that the work wasn't being done would apply to the entire force, wouldn't it?

A. No, because it was specifically mentioned that Mr. Newsom was not doing his part of the work.

Q. How did the station chief know which part of the work that Mr. Newsom was doing?

A. The station chief has a pretty good idea of what is going on in his plant.

Q. You got one complaint from Mr. Campbell?

A. Yes.

Q. Only one?

A. One covering a lot of items.

(Testimony of Charles R. Hathaway.)

Q. And you took that up with Mr. Kalins?

A. Mr. Hardway.

Q. And Mr. Kalins reported back to you that after he talked with Mr. Newsom his work improved?

A. Mr. Hardway, you are referring to.

Q. As I understand it, Mr. Zitlaw complained to you——

A. You said Mr. Campbell's complaint before.

Q. I am sorry, I meant Mr. Zitlaw's complaint.

A. Then, it was Mr. Kalins in that case.

Q. Then, the other matters, when Mr. Kalins and Mr. Warden reported that Mr. Newsom wasn't doing everything they expected of him, came up just casually in your conversations?

A. In what conversations? [344]

Q. I think you said the only time there was any complaint about Mr. Newsom's work was when you asked specifically about it?

A. I didn't ask for Mr. Zitlaw's complaint.

Q. Yes, you had one from Mr. Zitlaw and one from Mr. Campbell? A. Yes.

Q. You said there were some other remarks about Newsom's work that had been solicited by you? A. Yes.

Q. Did you consult with Mr. Noble before you called this meeting on the 15th?

A. Yes, I did. Not before I called the meeting, but before the meeting was called.

Q. Did you receive any instructions from Mr. Noble? A. Yes.

(Testimony of Charles R. Hathaway.)

Q. What were they?

A. He said the company might have certain reservations concerning the instrument men becoming members of the union.

He didn't tell me what they were, and that was about the extent of it.

Q. Mr. Noble formerly held the position you now hold? A. Yes.

Q. What is his present title?

A. General superintendent.

Q. In charge of—— [345]

A. All operating divisions of the company.

Q. And you have to work pretty closely with him in your job? A. Reasonably so.

Q. And he has on occasions expressed his opinion of unions? A. Surely.

Q. Would you care to state what his opinion is in reference to unions?

A. I wouldn't venture to know what his opinion of the union would be.

Q. You say it was sometime between January 15th and January 30th that you obtained Mr. Noble's permission to discharge Mr. Newsom?

A. Yes.

Q. And you say there has never been any question of Newsom's ability?

A. I believe the general acceptance is that he has the ability.

Q. Is it possible that his supervisors may have held him to a higher standard of performance than some of the other technicians?

(Testimony of Charles R. Hathaway.)

A. I doubt that. In fact, the other might be the case. I think they leaned over backwards to give the man a chance.

Q. Do you have any positions in your organization, I mean in the electrical production division, outside of the instrument department, that Mr. Newsom would be qualified to fill? [346]

A. That is hard to say because positions of that nature are fairly few and would be filled.

Q. At least at the time the decision was made to terminate Newsom you had no other vacancies under your supervision?

A. No, not on the same level. The only other opening would be to return to a helper's status.

Q. You didn't consider giving him a job with greater responsibility?

A. We didn't have one open at that time.

Q. You had made inquiry to find out if there was an opening in any other department of the company that was not under you?

A. No, I hadn't. However, if that had come up, I would have done so.

Q. So all your suggestions to Mr. Kalins relative to Mr. Newsom's transfer meant that if he could find a supervisor willing to take him you would not stand in his way; you would not say, "You can't have that man?"

A. It would be a matter of not standing in his way, but I would tell the truth.

Q. You would make a full disclosure and state that the man had a great deal of ability?

(Testimony of Charles R. Hathaway.)

A. Right, but that he had not applied it in our job.

Q. And that he could do fine work?

A. I don't know how fine work he could do but he did have the technical ability.

Q. And the only reason you didn't want him was because of his attitude?

A. Because of his attitude and because he didn't show enough interest in the work to do the work.

* * * * *

KENNETH CAMPBELL

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Luce): Will you state what your present position is with the San Diego Gas & Electric Company?

A. Station chief at Station B.

Q. How long have you been station chief?

A. Since September 1, 1945. [349]

Q. Will you tell us, please, what is your experience and background prior to your becoming employed by the San Diego Gas & Electric Company?

A. I had approximately 12 years' experience in maintenance and operation of steam-electric stations. That included all phases of operating work, maintenance work and instrumentation.

Q. By what companies?

A. The Central Arizona Light and Power Com-

(Testimony of Kenneth Campbell.)

pany in Phoenix and the Phelps-Dodge Company in Ajo, Arizona.

Q. When you first entered the employ of the San Diego Gas & Electric Company, in what capacity was it? A. Engineering assistant.

Q. What did that consist of?

A. Assisting the master mechanic in charge of maintenance and operation of Station B.

Q. How long did you occupy that position?

A. From April 27, 1942, until September 1, 1945.

Q. And then what position did you take?

A. My present position, which is station chief at Station B.

Q. State generally what your duties are at Station B.

A. I have the general supervision of all maintenance and operation of that station. That includes all operating men and all mechanical maintenance men, the maintenance electricians, storeroom men, guards, janitors, screen tenders, and condenser cleaners. [350]

* * * * *

Q. What do you do upon termination of employment in regard to interviews with the person involved?

A. We try to interview each man before he leaves the job, regardless of the type of termination; whether he leaves of his own accord or by request, we try to have an interview with him to

(Testimony of Kenneth Campbell.)

get his reaction as to the job and to help us in planning our work to do a better job.

Q. You had an interview with Mr. Newsom at the time of his termination? A. Yes, I did.

Q. And how long did that last?

A. Between two and three hours. I don't know exactly how long.

Q. When did you first become acquainted with Mr. Newsom?

A. At the time of his employment or during the interview prior to that, I believe. That is not a positive recollection, but I believe that was the time. That was March, 1948, I believe. [351]

Q. Did he start in at Station B?

A. He started there as a helper in the maintenance crew under my supervision.

Q. Did you observe his work from there on up until the time of his discharge?

A. Indirectly, until he transferred into the test department in I believe, October, 1948, at which time he had just completed the probationary period of employment, which is six months for every employee, and I recommended him to the test department for the job which they had in prospect.

Q. Did you observe his work after he entered the test department?

A. Only occasionally. I necessarily observed him at intervals and, having had him in our department, I was interested.

Q. Did he do the test work at Station B?

A. Yes, he did. How extensive, I don't know,

(Testimony of Kenneth Campbell.)

but he did the test work and he did the training of at least one other man.

Q. Now, will you state when your first knowledge was of any criticisms or trouble with respect to Mr. Newsom's work occurred?

A. It was in 1950, sometime prior to May. I don't know the exact date, but over a period of several weeks we had repeated complaints from the operating men, through their supervision, in regard to the ineffective manner in which the control equipment was being maintained. [352]

Q. What was done about that?

A. We discussed it at intervals with the efficiency engineer, Mr. Hardway, at that time, and no specific complaints were made.

We did turn in work orders or work requests that instrument work was to be done. In many instances that work was not done satisfactorily.

Q. Whose work?

A. The test department's work.

Q. What did Newsom have to do with it?

A. He was at that time instrument technician at Station B and he was therefore making the principal repairs to control equipment.

Q. Did you ever discuss with Newsom his work or the criticisms of his work?

A. With Mr. Newsom?

Q. Yes.

A. That was not my responsibility; he was under another supervisor.

Q. What else did you observe about his work?

(Testimony of Kenneth Campbell.)

A. His general attitude towards the job was the primary concern which I had.

Q. State what that was.

A. A tendency of having too much time on his hands during the period when he was breaking in Mr. Webb prior to and possibly during May, 1950. I frequently found them in a state of inactivity at the time I was making the rounds through the plant, and, apparently, with no definite objective ahead of them when I knew there was work to be done.

We had one specific complaint of horseplay which was called to my attention by the storeroom men, which I reported to Mr. Hardway, and this particular——

Trial Examiner Myers: When did you report it?

The Witness: Immediately after the condition was called to my attention.

Trial Examiner Myers: I mean, could you fix the month?

The Witness: It must have been the early part of May, 1950.

Trial Examiner Myers: You mean, approximately May, 1950?

The Witness: Yes, sometime prior to May 18th, because on that day Mr. Hardway had a conference with Mr. Newsom.

Q. (By Mr. Luce): Go ahead and state any other things you observed.

A. This particular case of horseplay was at the storeroom window. It involved a note which had

(Testimony of Kenneth Campbell.)

been placed on the storeroom which inferred some reflection on the storeroom men, to which they took exception. I investigated that problem personally and found that Mr. Newsom did not write the note which caused the trouble, but apparently he was enjoying the effects of it at the expense of the storeroom men.

His general attitude in the plant was one of listlessness during my observations. [354]

Q. How long did that continue?

A. Over a period of several weeks prior to May, 1950.

Q. After May, 1950, what happened?

A. I frequently inquired as to how Mr. Newsom and Mr. Webb were both getting along inasmuch as I had recommended both of them. I thought they were both capable boys and I wanted to see them make good. My answers to these inquiries were made to the efficiency engineer, Mr. Hardway, later on Mr. Kalins, and to Mr. Warden. The answers to these inquiries were that his work was spasmodic. It would be good for a while and then poor.

Q. Now, after May, 1950, was Mr. Newsom working at Station B at any time?

A. Some of the time. Exactly how much, I don't know.

Q. But most of the time he was at Silver Gate?

A. I am not in a position to say.

Q. He was in Station B?

(Testimony of Kenneth Campbell.)

A. I don't know how long he was at Station B after May, 1950.

Q. What portion of the time, could you tell us?

A. I wasn't familiar with his schedule and therefore only saw him at intervals in making my rounds through the plants. I didn't have knowledge of his actual assignments.

Q. Now, were you present at the meeting on January 30th in Mr. Hathaway's office?

A. Yes, I was. [355]

Q. Will you state what occurred at that meeting?

A. That was a meeting of the station chiefs and the department superintendents. During that meeting our work was interrupted, at which time Mr. Kalins and Mr. Warden came up to present a program, a request for a program on training of instrument men.

There was a general discussion of the values of the program and some discussion of the details of handling it. It was decided that the program would be put into effect, and after that was decided there was a question in regard to how the instrument men were getting along.

At this time it was reported by either Mr. Warden or Mr. Kalins, I am not sure which, that his work was still not satisfactory. There was a general discussion as to what should be done with him, and each man in the group had an opportunity to express his views, based upon his experience and judgment. It was decided that for the good

(Testimony of Kenneth Campbell.)

of the entire department it was better if Mr. Newsom would be terminated.

Q. Did you express your opinion at that meeting? A. I did.

Q. Will you tell us what you said?

A. I can't tell you exactly, but my opinion was that due to his inability to adjust himself to the conditions of the job, that he should be terminated from that department.

Q. Now, were you actuated in giving that opinion by the fact that Newsom had been involved in union activity? Would that affect you in any way in the termination of any man, whether he had been in union activity or not?

A. Not in the least.

Q. Did you have union men working under you?

A. Almost all the men are union men. We have exceptionally good relations with them.

Q. You have no objections to union men?

A. Not at all. I have been a member myself.

Q. Now, in regard to the transfer of a man from one department to another, did you hear anybody say that Newsom would be given the privilege of applying for a transfer?

A. I am not sure that during this meeting that was discussed, that is, while Mr. Kalins and Mr. Warden were present. It was discussed in connection with his possible termination. It is the practice and policy to try to place a man some place to the advantage of the company and to that man.

(Testimony of Kenneth Campbell.)

Q. You have known of instances of men applying for it and obtaining a transfer from one department to another?

A. We have carried men for as long as 18 months when, in fact, they were not fulfilling the requirements on our job.

For instance, after 18 months he took a better paying job in the plant construction department. In another instance we carried a man for several months, I don't know how long, and arranged a transfer for him into the transportation department [357] at a better paying job.

We have transferred a number of men to other departments who were not able to make the grade in our department.

Q. Were there any objections on your part or on any else's, as far as you know, to Mr. Newsom being transferred from the technician instrument division to some other department or division of the company? A. Not to my knowledge.

Trial Examiner Myers: Assuming that Newsom couldn't be transferred two another department for reasons of there being no job available, how long would he have been carried in that instrument department?

* * * * *

The Witness: Possibly for a few weeks. That would have been contingent on his attitude. [358]

* * * * *

(Testimony of Kenneth Campbell.)

Cross Examination

Q. (By Mr. O'Brien): Did you have any position for Mr. Newsom under you?

A. I beg your pardon?

Q. Did you have any position for Mr. Newsom under your supervision on January 30th?

A. We did not.

Q. You don't recall any discussion at that meeting on the 30th of where he might transfer?

A. I don't believe a specific department was mentioned.

* * * * *

Q. You knew him as a capable man?

A. Yes.

Q. You say you saw no difficulty with his work at all until [359] around May, 1950?

A. That was the first time it came to my specific attention.

Q. And he had been working at different periods under you for two years?

A. I had not made a specific inquiry until after May 18th. There was a discussion following my report to his supervisor and then I did check up more closely after that.

Q. And the answer you received from the instrument engineer was that Mr. Newsom's work was spasmodic? A. That is right.

Q. I think you said you observed a general listlessness. When was that?

A. During the weeks prior to May 18th.

(Testimony of Kenneth Campbell.)

Q. Of 1950? A. Yes.

Q. That is late April and early May?

A. Possibly during that period. I made no record of that time. These men were not directly under my supervision and I wasn't interested in them only by the fact they had at one time worked under me, which was my responsibility, and for their own good.

Q. Was that when you made your complaint to Mr. Hardway?

A. Yes, it was in connection with the report I had from the storeroom.

Q. I think you said Mr. Newsom was teaching Mr. Webb his job [360] at Station B?

A. I understood he was breaking in Mr. Webb in that time.

Q. So anytime that you saw that they weren't working, isn't it possible that Mr. Newsom was instructing Mr. Webb?

A. Some of that time would be occupied in instruction work, I realize that.

* * * * *

Q. From your job as station chief, if some particular instrument required immediate attention, what procedure did you follow?

A. In the absence of the instrument engineer, if it was an emergency, we go directly to the man in charge of the job. That is the instrument technician. We go to him and ask him to assist in taking care of this immediate job.

(Testimony of Kenneth Campbell.)

Q. Did such an emergency ever occur when Mr. Newsom was at Station B?

A. I don't know of any such instance.

Q. You know of no occasion when he refused such assistance? A. No.

Q. When there are cases where there is a little bit of doubt as to an instrument and when you would like to have it taken care of, but it is not an emergency—— [361] A. Yes.

Q. ——what is the procedure on that?

A. It is usually handled through the regular channels in that department.

Q. That is, the operator expresses it to you, you send it to Mr. Warden and he assigns that work?

A. That is the general pattern. However, there is a short circuit in that from notes made in the log. The log maintained by the operators is picked up directly from the log, I believe, by the instrument men and repairs made without getting a specific order from Mr. Warden.

Q. There are some instruments that record 24 hours a day. You take out one piece of paper and you put in another, is that true? A. Yes.

Q. It is the job of the instrument technician to remove that record?

A. In most cases it is the job of the operator.

Q. The operator takes a look at the record and puts a note on it for the instrument technician?

A. That is right.

Q. If the instrument technician sees something

(Testimony of Kenneth Campbell.)

on it he will talk to the operator and he will take care of it immediately?

A. That is right.

Q. If there is something neither one of them understands, the instrument technician will put a note on it, calling it to the attention of Mr. Warden so they can get together and figure out the trouble? A. I believe that is right.

Q. In any of these phases of his duties did Mr. Newsom fall down?

A. In the general maintenance of boiler controls, specifically, work was not done completely. I can't say a specific case. I can't point to a specific instance, but I know we had reports from our operators, and if it had been done, we would not have had the reports.

Q. You can't tell us in what way it was not done completely? I have given you a couple of examples, now you give me one.

A. For instance, at minimum loads on the boilers we have to drop down to quite low loads during certain periods of the day. We had had trouble with air controls, automatic controls on the boilers, which I know continued over a period of several days without proper correction. I don't recall other specific instances.

It was in a general manner in which these reports came in through shift supervisors from their firemen.

Q. This matter of air controls, that may have been something which Mr. Newsom could take care

(Testimony of Kenneth Campbell.)

of immediately or it might have been something that needed to come before Mr. Warden?

A. In some cases it might have been possible. It might have [363] been the case.

Q. From your standpoint, the work was a little bit slow?

A. The work was not a little bit slow, it was not maintained.

Q. Your complaint to Mr. Hathaway was specific of Mr. Newsom, but of the department in general?

A. It involved Mr. Newsom's attitude.

Q. We keep coming back to his attitude.

A. Work output and the qualifications are minor considerations in the adjustment of any employee.

Q. So far as you know, did he ever refuse to obey an order? A. Not to my knowledge.

Q. Did he follow all the instructions that you gave him?

A. I don't believe I gave him specific instructions. He was under my general supervision.

Q. Can you tell us just what Mr. Hathaway said relative to Mr. Newsom on January 30th?

A. I can't tell you the exact words.

Q. I realize that. Everyone has his own recollection; I would like to have yours.

A. The summary, as I recall, by Mr. Hathaway was to the effect that it looked as if we should terminate Mr. Newsom, and he so instructed Mr. Kalins to carry out that decision.

Q. Did he address the question directly to you?

A. In regard to my opinion?

(Testimony of Kenneth Campbell.)

Q. Yes. [364] A. He did.

Q. What was his question to you?

A. It was my opinion as to what should be done in the case of Mr. Newsom, considering everything of general knowledge we knew about him.

Q. What was your answer?

A. It was to the effect that for the advantage of the job——

Q. That is something you may be able to remember, in your own language, or to reconstruct it.

A. Unfortunately, I cannot remember the exact words.

Q. Well, to the best of your recollection, sir?

A. It was to the effect that for the good of the entire department I felt he should be terminated.

Mr. O'Brien: That is all.

Q. (By Trial Examiner Myers): What was said, if anything, about the instrument men? What was said at the January 30th meeting about the instrument men organizing and the request of the union to represent them?

A. There was a general discussion of that as to how it affected the termination of Mr. Newsom in connection with that problem.

Q. Who entered into the discussion?

A. I believe it was general discussion.

Q. Did you take part? A. Yes, I did.

Q. What did you say?

A. My opinion was that regardless of the union activity at the time if we had a problem which

(Testimony of Kenneth Campbell.)

needed to be handled we still have to run or business.

Q. When was that discussed, before or after the question of final determination to terminate Newsom?

A. It must have been during that discussion, exactly what part I don't know.

Q. Who brought up the question?

A. I couldn't say. We knew there would be a problem there. We knew that we probably would be charged in that manner. We still have to face the problem of our job.

Q. It was the consensus of opinion to proceed against Mr. Newsom despite the union?

A. That is right.

Q. When did you first hear about the instrument men wanting to organize?

A. I don't know, definitely. It was, possibly, some time after their meeting with Mr. Hathaway on January 15th.

Q. Was it before the January 30th meeting?

A. Yes, before January 30th. [366]

* * * * *

WALTER S. ZITLAW

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Luce): What is your present posi-

(Testimony of Walter S. Zitlaw.)

tion with the San Diego Gas & Electric Company?

A. Station chief at Silver Gate.

Q. How long have you been station chief?

A. Since about March, 1943.

Q. And were you employed by the company prior to that time?

A. Yes, I entered the company's employ July, 1941.

Q. In what capacity?

A. Engineering assistant.

Q. Prior to employment by the San Diego Gas & Electric Company, had you had prior experience?

A. I was employed by the Phelps-Dodge Company in a similar capacity.

Q. For how long? A. Eight years.

Q. Will you tell us when you first became acquainted with Mr. Newsom?

A. My first acquaintance with Mr. Newsom has completely passed my memory, but it was at the time of his first employment. I noted him as an applicant, and I had no contact with him until sometime in 1949.

Q. At that time what work was Mr. Newsom doing?

A. At that time, March or April, it is my recollection that he was brought to the Silver Gate Station to work with the instrument technicians in the care and maintenance of the instruments at Silver Gate.

Q. From the time he came to the station in 1949

(Testimony of Walter S. Zitlaw.)

until the time of his termination, did you have occasion to observe his work?

A. Yes, as station chief I observed the actions of all departments within the station and I observed his work rather closely at times, and in general all the time.

Q. Will you tell us in your own way what you observed in regard to his work from the time he first came to Silver Gate Station until his termination?

A. My first recollection of Mr. Newsom, early in 1949, was a very favorable memory. He put out considerable effort. He seemed to be very interested in the work, and he was very co-operative in any of the various problems that arose at the station.

As time passed on he became lax in his duties and I received numerous complaints from the operators, and even complaints from the maintenance forces concerning his lack of attention to the duties.

His place of work, that is, his office, the place where he could be found most of the time, was immediately across the hall from the office and I noted that he spent a great deal of time there rather than at the scene of the work. [369]

* * * * *

Q. Did you ever talk to Newsom about his work?

A. No, I felt that was not my responsibility to talk to him personally. However, I mentioned the condition to Mr. Warden on several occasions when

(Testimony of Walter S. Zitlaw.)

specific things were brought to my attention. These things were, sometimes, in themselves of very small magnitude. Sometimes they amounted to a great deal. I remember none of them in particular because I made no good or mental note of them.

Q. How did his work progress? Did it improve or not?

A. No, after the laxity, again it continued that way until they moved him away from Silver Gate. They probably considered him a thorn in the flesh so they took him back to Station B.

Q. Just when? Do you recall?

A. I do not recall. When they took him back to Station B, it was the latter part of '49.

Q. Well, what was the nature of the complaints that came to you while he was at Silver Gate?

A. His failure to take care of the various things set before him in the nature of problems. The operators at each station maintain a log in which are kept a written note of anything that is wrong. Mr. Newsom would pick these things up, or they would be handed to him by his superior to take care of. More than once he passed them by, apparently intending to do them, or they were never completed.

The firemen at the boiler stations were particularly distressed because of the fact that the controls were not being taken care of and minor adjustments were not being made as requested in the log.

Q. Over what period of time did you really observe his work?

(Testimony of Walter S. Zitlaw.)

A. From early in 1949 until the latter part or middle of 1949. I don't recall how many months were involved. Between the time he left Station B and was returned to Silver Gate late in '50, and from that time until the completion of the No. 1 overhaul I had an opportunity to observe him again very closely.

Q. What was your opinion of his work at that time?

A. From the early part of September until November I took very little note of what he was doing or just what was being handled by Mr. Newsom because my particular affairs were pressing me to the hilt. I took no particular note of what he was doing until about the middle of November when I wanted to take a complete stock of the situation at Silver Gate. I inquired into the work of the instrument department to find out what was being done in the overhaul of the instruments and the controls of Unit No. 1.

I found that the responsibility had been delegated to Mr. Newsom and that he was proceeding with that. At that time a sufficient time had passed in my opinion that the work should have been completed, but I learned that he had other duties to perform, also, and I took no further note of it other than to watch from that time on to see how we were proceeding.

I noted that he had help. Though he had a considerable amount of work to do, very little of it was actually being executed and this distressed

(Testimony of Walter S. Zitlaw.)

me quite a bit because we were having our troubles trying to get this unit repaired and ready for service.

Again I called this to the attention of Mr. Hathaway that this work was lagging behind. I also called it to Mr. Warden's attention, at which time Mr. Warden was actually engaged most seriously on the combustion tests of No. 5, the new boiler.

Q. Did anything happen after that?

A. No. Unfortunately I found no improvement in the condition.

* * * * *

Trial Examiner Myers: Go ahead and explain it.

The Witness: As we approached the end of December I noted that this work was still not being completed and I raised considerable question. At that time it was necessary to put additional help on, under the direction of Mr. Warden, to get the job completed and ready for operation right after [372] the first of the year.

Q. (By Mr. Luce): Now, from your observation of Mr. Newsom during the period you have outlined, what was your opinion in regard to the efficiency and quality of his work?

A. He has exceptional ability when it is work to his interest. If he finds interest in the work, he can do a good job and he can do it with dispatch. The work we have is not the type of work that will hold his interest over any period of time, and he doesn't fit that picture at all.

Q. Why?

(Testimony of Walter S. Zitlaw.)

A. I really don't know. I am not a psychologist, I suppose it is his temperament and attitude towards the job. He doesn't seem to accept the job for what it is.

Q. In what way?

A. Because of the failure to continue to prosecute each assignment that was his, each responsibility that was his. He would let them go by for lesser things or for just laughs, doing nothing.

Q. Now, Mr. Zitlaw, you were present, were you not, at the meeting in Mr. Hathaway's office on January 30th? A. Yes, I was.

Q. Will you tell us what you remember of the meeting and the conversations?

A. The meeting was the regular meeting held by the superintendent with the two station chiefs to discuss whatever problems might be before us at that particular time.

This particular meeting, Mr. Kalins and Mr. Warden were present because they had a problem to present to us covering the training program for the technicians and the men of the instrument group. They gave us a brief outline of the plan and asked our opinions and ideas, which we probably gave, I don't recall any details on that.

In the course of our discussion we discussed how this plan would be carried out, at what time and hours the work would be done and the training program worked in, and we finally came to the point of discussing the individuals who would be involved.

(Testimony of Walter S. Zitlaw.)

I believe Mr. Hathaway—in fact, I am sure it was Mr. Hathaway, asked concerning the conditions under which the men were found at that time. His wording was, "How are they doing?" or "How are they getting along?" Either Mr. Kalins or Mr. Warden, I don't remember which, explained the situation of each individual, and Mr. Newsom's case was presented as being very unfavorable and his work not being satisfactory.

Q. Go ahead.

A. At that particular point Mr. Hathaway posed the question, "What are you going to do about this particular man?" I don't recall who opened the discussion on what to do about this thing, but it went around to all of us, myself included, and it was our unanimous decision that the best thing to do for the department, and for the man himself, was to terminate him.

Q. Do you remember what you said at that meeting?

A. Only in substance, but I concurred with the idea, because I had observed the man on two different occasions, both over a considerable period of time, and it was my firm opinion he was entirely misplaced; that there was no help that we could give him which would be constructive and save him for the job at hand. [375]

* * * * *

Trial Examiner Myers: Go ahead.

The Witness: That was the decision that was reached and I concurred with it because I felt

(Testimony of Walter S. Zitlaw.)

that was the best thing to do, to terminate the man.

At that time Mr. Hathaway delegated the responsibility to Mr. Newsom's superior, Mr. Kalins, to terminate him from his work.

Q. (By Mr. Luce): Did the activity of Mr. Newsom towards becoming a member of the union or having the union speak for this group of instrument technicians have any effect at all upon your decision or your statement that he should be terminated?

A. No, sir, that was no part of the consideration at all.

Q. Have you any prejudices at all against the union or anybody joining the union?

A. I certainly do not have.

Q. Would you have any objections or interfere in any way with Newsom or the instrument men joining the union?

A. I would not stand in their way.

Q. That didn't play any part at all in your decision? A. No.

Mr. Luce: That is all. [376]

* * * * *

Cross Examination

Q. (By Mr. O'Brien): When did you first notice the change in Mr. Newsom's attitude?

A. In 1949, shortly after his arrival at Silver Gate and he became thoroughly saturated with what was about him. I noted the change coming about by personal observation.

(Testimony of Walter S. Zitlaw.)

Q. Was that within a week or two?

A. No, I would say a month or possibly four or six weeks. He was very effective in his application for the first three or four weeks there.

Q. During March and April he made an excellent impression?

A. Yes, those are the months that I recall to my mind.

Q. Then was it in March that he started spending a great deal of time in his office?

A. It was either in March, April or May. I would stand corrected on those because I don't know them exactly.

Q. Was there any other instrument technicians at Silver Gate at that time?

A. I believe not. Mr. Warden spent a portion of his time there. He was always there in the mornings and occasionally returned during the day and spent a great deal of his time with Mr. Newsom.

Q. When you had observed him had he been on the job long enough to learn all the intricacies of it?

A. He was pretty well trained, yes. He had been on the job long enough to take care of the details that were his to take care of.

Q. Was he familiar enough with the Silver Gate Station to take care of it?

A. Yes, familiar enough with it to take care of the work. He wasn't familiar enough with it to take care of the combustion tests, no, but on the

(Testimony of Walter S. Zitlaw.)

routine instruments and gauges he was very competent.

Q. He had quite a bit of office work?

A. No, I don't believe so. I believe the total amount of his office work could be embraced in one and one-half hours. I asked what records they were keeping and Mr. Warden showed me the records which were kept, because at that time I was not aware of it at all.

Q. So your opinion is based on casual conversation?

A. I made an issue to contact him because of the situation I had observed.

Q. You don't know what other work he may have had in his office besides keeping records?

A. No.

Q. He might have been calibrating instruments?

A. I am not sure, but I am sure he was not calibrating instruments.

Q. He might have been studying some books?

A. It is very unlikely. There were no books available at that time and I could recognize that at a glance.

Q. What were you doing while you were watching him?

A. I pass by the door frequently. I was in and out of my office, to and from the job.

Q. It might have been a coincidence that he happened to be in there when you passed by?

A. A very odd coincidence.

(Testimony of Walter S. Zitlaw.)

Q. You said you spoke to Mr. Warden on several occasions?

A. That is correct. Some amounted to small instances and some that amounted to a great deal.

Q. Tell us about "a great deal."

A. I am not going to be able to specifically state any one of them for I did not make a written record of it. They were brought to me by the operators and the shift supervisors. The recollection I have of one that was particularly disturbing was the situation of the differential gauges on the traveling screens which have to do with the alarming in case of high differential screens and also the starting of the screens automatically, in which case the device was not made operative and no correction made on them to get them in an operative condition.

Q. Do you know if he had received instructions to do that?

A. It had been entered into the log.

Q. The operating department enters it in the operating log? A. That is correct.

Q. And you don't know whether Mr. Newsom took that up with Mr. Warden or not?

A. He would not have to. He would assume that immediately upon inspection as the job at hand.

Q. Do you know whether it was within his ability? A. Oh, yes.

Q. Do you know if he ultimately corrected the settings?

A. Unfortunately not. Mr. Warden had to make it his personal business to take care of that particular job.

(Testimony of Walter S. Zitlaw.)

Q. Did that interfere with the operation of the plant in any way?

A. No, but it interfered with the security.

Q. To what extent?

A. To the extent that if the traveling screens became plugged the condensor would be without circulating water.

Q. I see what you are talking about. Your exhaust steam goes to a tidewater basin?

A. Certainly.

Q. Where it is condensed into water and is used again?

A. It goes into a condensor, yes.

Q. And then there is ocean water coming in, circulating around these?

A. That is right.

Q. And there is a screen—first of all, there is some baffle that acts as a trash catcher? [380]

A. That is right, a trash vent.

Q. Then you have a porous screen to catch this semi-dissolved or catch small pieces of sediment?

A. That's right.

Q. And in the event of that screen becoming clogged would be that the condensors would not work quite as well?

A. We have had experiences where it would not work at all.

Q. It is the job of the instrument technician to take care of the screen?

A. It is his job to take care of the instruments

(Testimony of Walter S. Zitlaw.)

so that in the event the differential across the screen becomes excessive, we would be notified by the alarm.

Q. The screen was working?

A. Yes.

Q. It works only intermittently, it doesn't work continuously? A. Yes.

Q. It is no failure of Mr. Newsom to do anything that interfered with the operation of that screen in any way?

A. The automatic controls and the alarming of the differential, yes.

Q. Doesn't the water still continue to go through? A. On a clogged screen? No.

Q. And did the screen get plugged? That was my next question. [381]

A. We have had screens plugged, yes.

Q. But not on that occasion?

A. On this occasion, no, I could not say on this particular occasion. If there was a screen plugged, the operator would have to spend additional time operating the screen.

Q. But you would say there have been numerous occasions when the screen was plugged?

A. All of them.

Q. All of which Mr. Newsom had nothing to do with?

A. No one has anything to do with the debris that comes in from the sea that plugs the screen.

Q. Did anyone tell you why Mr. Newsom was

(Testimony of Walter S. Zitlaw.)

transferred from Silver Gate to Station B in the fall of 1949? A. No.

Q. You weren't told the reason was to teach Bob Cole the routine at Station B?

A. I was not told that. [382]

* * * * *

COSBY M. NEWSOM

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. O'Brien): Mr. Newsom, did you hear the testimony yesterday relative to Respondent's Exhibit No. 2? A. Yes, I did.

Q. Did you examine Respondent's Exhibit No. 2? A. I did, sir.

Q. With reference to the errors pointed out by Mr. Warden on Respondent's Exhibit No. 2, I ask you to look at page 1 of that exhibit and explain, if you can, the encircled items?

A. On page 1 of Respondent's Exhibit 2, I see in the column designated "Weekly," the figure 4 circled. That refers to page 2, Item 4, calorimeter. The fact that this is checked on my record, or page 1 of this exhibit, is indication that the work was done. The fact that the work was done and was not recorded on the calorimeter sheet, which is in the exhibit, page 13, is relatively insignificant because I think that this would not show in the

(Testimony of Cosby M. Newsom.)

log. I believe this is the only record of the Silver Gate routine sheet.

The same holds true of the second item 4 in the weekly column with the check mark. In the monthly column, the No. 8, which is circled, refers to page 3, item 8, "Check all alarms."

I believe, while it is stated on page 1 that this item was started on 1-15-51, and not so indicated, the appearance of the figure 8 opposite the number 23 in the margin refers to the day of the month, and is an indication that the work was due to start on the 23rd.

However, from time to time it is necessary for the instrument men to cooperate with the electricians in checking some alarms. It is my belief that on the 15th of January, 1951, the date shown on page 14, the alarm setting record for 1951 is the date the alarms were taken.

I believe that on that date Mr. Merrill contacted me at Silver Gate and asked me to assist him in checking some alarms. On that date I started a routine, or, rather, a rough record of these alarms that I dated that date, and due to the nature of the alarm work, it is a natural to fit it in with other jobs or between other jobs.

In reality, the alarms were taken down at various times during the 15 days. They weren't completed on any particular day and in transcribing from my work sheet to the 1951 alarm setting record, I copied in the date I had begun checking these alarms.

(Testimony of Cosby M. Newsom.)

There is an item circled in the monthly column, the No. 10. Page 3 of the exhibit informs us that it is the calorimeter. It is checked off on the Silver Gate routine sheet as an indication that the routine was done.

On page 13, which is the sheet which is kept of the calorimeter, there under the 29th he has "See 10," and he has circled a place where I omitted a notation on that.

That could have been simply an omission. As a matter of fact, it should have appeared in the daily log for Silver Gate as routine work having been done. I doubt if it appears there either.

Q. Does that complete your explanation of the items on page 1? [386] A. Page 1, yes.

Q. I now call your attention to pages 3 and 4. According to the testimony of Mr. Warden the work described on page 4 did not require the services of two men?

A. Page 4 of Exhibit 2?

Q. Yes. The names Newt and Fowler appear at the top.

A. This is a two-man job. Page 4 is Fowler's sheet and page 5 is Mr. Newsom's sheet.

Mr. Warden stated in his testimony that this is a one-man job.

* * * * *

The Witness: To my knowledge, this is still considered a two-man job and two men are used on the test.

(Testimony of Cosby M. Newsom.)

Trial Examiner Myers: Was it a two-man job in January of this year?

The Witness: The test instructions on this test require readings at ten-minute intervals and it is impossible, practically, for one man to take this amount of reading plus an Orsat reading in ten minutes.

Q. (By Mr. O'Brien): You say the instructions on this particular job. Does that refer to the one that Mr. Warden described that hangs in the instrument room? A. Yes.

Q. You may proceed.

A. My attention was drawn to Page 5 and "Burner No. 1, registered notches open," and "Burner No. 1, position, inches." There is a large circle below the center of the page 5. The settings of the burners in the registers were common. The setting of the No. 1 burner position and notches open of the register is typical of all the burners, and I checked that thoroughly.

It is not too clear here what I should have done, unless write in 16 thirty two times among the squares and 21 thirty two times would have cleared the matter.

Q. With reference to page 6, Mr. Newsom, my notes indicate Mr. Warden said that these tests were made with excess air. I also note here two separate circles made by Mr. Warden.

Do you have an explanation for these three factors?

A. Yes, the upper circle among the data on

(Testimony of Cosby M. Newsom.)

Boiler No. 4, the settings we are instructed to make on the boilers are identical for No. 3 and No. 4. I entered the numbers 13, 14, 12 and 12 for the registers and the burner position was 17 inches. These are also common to both boilers and therefore I did not list them across the page for Boiler No. 4.

However, I made sure the conditions were present at the time of the combustion check. Mr. Warden also mentioned, in relation to the lower circle which encloses a group of figures relating to a percentage, excess air present in the flue gases as found by me in the course of an analysis. I believe he said the excess air was not within the limits as found in the instruction book.

The purpose of these boiler tests is to determine the amount of excess air given under a standard condition of operation, such as steam flow, fuel temperature, burner position and registered setting.

These settings are arrived at during the initial light off of the boiler after an overhaul. The excess air being just enough to insure complete combustion of the fuel and not enough to cause undue heat loss from the stack.

Any deviation from the percent of the excess air required to effect complete combustion of the fuel would mean that the fuel air meters are out of calibration. That is the purpose of these tests, to determine if the meters are in calibration. If they

(Testimony of Cosby M. Newsom.)

are not, that would be the problem of the maintenance man at the station.

Q. With reference to page 7 there were two items circled by Mr. Warden. I believe Mr. Warden also commented that two men were required on the job described on page 7, whereas only one name appears in the upper right-hand corner, "Observer Newt."

Do you have any explanation for those omissions?

A. I believe I do. Mr. Warden is right. There are two men required for these tests. One observer on the turbine floor and another in the basement.

If you look carefully in the upper left-hand corner of this page, under the word "turb," you will see two marks where this sheet had been stapled to another sheet. This is page 7.

The test is only 50 per cent in the exhibit. The other sheet of the test would show Mr. Fowler's figures which would cover the two items circled here, 266.5 and 96 in the extreme right-hand column of the averages.

Trial Examiner Myers: What figures are these?

The Witness: The circled figures, 266.5 and 96 in the right-hand column.

Trial Examiner Myers: These are not your figures?

The Witness: I transcribed them here, but they are from the other sheet of this test and exactly what readings they pertain to they are on the other sheet which has been detached from this sheet.

(Testimony of Cosby M. Newsom.)

Trial Examiner Myers: Where did you get these figures—from Mr. Fowler?

The Witness: Yes.

Trial Examiner Myers: At the risk of belaboring this matter of Psi, the figures 7.6 on page 7 indicate what?

The Witness: 7.6 inches of mercury vacuum, negative pressure. [390]

Trial Examiner Myers: It should have been inches of mercury instead of psi?

The Witness: Under test conditions this is always inches mercury and it is always negative. Why it was printed psi in the first place, I don't know.

Q. (By Mr. O'Brien): Calling your attention to page 8, there are several items circled. Do you have any explanation for these omissions or errors?

A. Looking up in the extreme left-hand corner you can see that this sheet was stapled to another sheet which was taken either by Mr. Shroble or Mr. Fowler. I believe possibly they collaborated on it.

This is also psi, which should have been changed to inches of mercury, negative.

The two other circles in the left-hand corner, the lower left-hand corner, C.W. temperature in and out No. 1 and No. 2 and C.W. No. 1 and No. 2 discharge pressure were readings for which the person in the basement is responsible.

However, with my limited knowledge of the

(Testimony of Cosby M. Newsom.)

plant, I knew immediately upon seeing that this is a Unit II test that the number should have been changed to No. 3 and No. 4, in that order, on this paper.

Trial Examiner Myers: On the left-hand side?

The Witness: Yes.

Trial Examiner Myers: Instead of No. 1 and No. 2, what [391] should it have been?

The Witness: 1 and 2 pertain to Unit I only. It is quite obvious it is C.W. temperature No. 3 and No. 4. Also with the C.W. pump discharge pressure refers to No. 3 and No. 4.

Mr. Fowler or Mr. Shroble were responsible for that.

Q. (By Mr. O'Brien): With regard to page 9, there are numerous circles again. Do you have any explanation for the items called to your attention by Mr. Warden?

A. The first group of figures I see circled are 515 repeated four times across the page. There is also a sheet missing on this test.

Pertaining to these figures 515, that refers to the steam flow at Turbine No. 3 and the unit is 1,000 pounds per hour. We get this reading from a chart.

Q. The chart is on Page 10, which was explained by Mr. Warden.

A. The test instructions for Unit III or any other unit turbogenerator check test are a group of at least four readings at ten-minute intervals.

Referring to the chart, we match our time up.

(Testimony of Cosby M. Newsom.)

We see at 1:00 a rather wide white line. That line was made by the steam flow pen. It seems that the steam flow was bearing about 20,000 pounds an hour. In other words, the pen had a gradual up-and-down motion across the face of the chart.

Now, in taking my readings at ten-minute intervals it is quite possible that when I read these I read where the pen is in relation to the chart at the moment I looked at the chart. When I read that at any position here, covered by the white line, I have no assurance that the pen is going to continue to move and I have no way of knowing at that time it is going to scribe that wide a line.

Sometimes during the course of the test the movement of the pen becomes erratic. Sometimes you must discard the test data because of that. I read the pen at precisely the instant I looked at it and each time I read it the pen was 515.

If my instructions had been to establish test conditions on the unit, to wait for everything to become stabilized and draw from that chart an average of what had been recorded on these charts, I would have certainly arrived at the conclusion that the line drawn here averaged 520.

However, these were not my instructions. As I stated before, my instructions were to read the position of the pen on the chart at ten-minute intervals for 40 minutes.

We have two circles in the lower left-hand corner here. The form is the same. It says here No. 1 and No. 2, C.W. temperature in and out and

(Testimony of Cosby M. Newsom.)

C.W. pump No. 1 and No. 2, discharge preessure.

As in the previous instance, this sheet might be considered obsolete. However, it is obvious to me that in a test on Unit III, the equipment referred to, the temperatures referred to would be the No. 5 and No. 6, and No. 5 and No. 6.

Also, the C.W. pump discharge pressure would be to the C.W. pump 5 and C.W. pump 6.

There is a circle in the average column for the C.W. pump pressures which are a basement reading. The people that handled the basement end of this test was either Mr. Shroble or Mr. Fowler. They either left it blank on their sheet, or not being able to see the other sheet, I am not able to tell what it is. I may have forgotten to transcribe it, however, I doubt that. I believe the gauge on No. 5 reads nothing at this load.

Q. Going back to page 8, there is a long cricle here from the figure 279 down to 249 in the right-hand column.

Mr. Luce: What page is that?

Mr. O'Brien: Page 8.

The Witness: That is a definite error. However, in transcribing the figures from the basement sheet, which is not here attached, in placing the basement sheet over this sheet in order to write the figures in, I imagine I placed this sheet one square too high.

Trial Examiner Myers: You mean these all should have been up one?

The Witness: They should have all been down

(Testimony of Cosby M. Newsom.)

one. You can see the figures 279 on the left-hand side. The figures 279 should jibe with these in the average column. If these two figures jibe, then the rest are in sequence. [394]

Trial Examiner Myers: Who put in the figures 279 and 279 followed by the arrows?

The Witness: We read that once. It is a reading quite distant from the turbine panel and the reading is of the deaerator water and the deaerator vapor temperatures one time during the test. The arrows indicate that they hold true for the other four.

Trial Examiner Myers: Did you discover the error in the transposing of the figures prior to submitting it?

The Witness: The chances are I was called away and it was picked up and put in the file.

Q. (By Trial Examiner Myers): I mean in the left-hand side, the figures 279 and the arrows, then the next figure 279. Do you see what I mean?

A. I put the arrows there.

Q. Why?

A. To point out that the figure 279 is the temperature to consider for the four readings. That is common practice.

Q. I thought you were just indicating that the line should be dropped.

A. No. If I had noticed it, my mistake, I would have erased it and put it in order.

Q. What is the question mark with the circle around it?

(Testimony of Cosby M. Newsom.)

A. That is the condensate flow which is a basement reading. Mr. Fowler and Mr. Shroble did the basement work on this test.

Q. (By Mr. O'Brien): I believe Mr. Warden testified that pages 11 and 12 should be read as a unit. There was something on page 12 he called to our attention and that is the last column with the heading 1-23-51, and underneath the date the name "Webb," which has apparently been erased.

There are numerous other erasures. Tell us what you know about it.

Mr. Luce: Is Mr. O'Brien testifying? I don't believe there is any testimony that there are any other erasures on the page.

Trial Examiner Myers: Strike out the remarks in reference to Mr. O'Brien testifying. Go ahead.

Mr. Luce: Didn't he explain that on direct examination?

Trial Examiner Myers: Go ahead.

Did you put Webb's name in there?

The Witness: No, sir, I did not. I have something to say about this.

Mr. Luce: What page is this?

Mr. O'Brien: Page 12.

The Witness: The column with the designation 6-7 and "Newt" written under it, I was responsible for that column, and also for the column 7-7 and the figures following. It does not appear to me that the figures in the column 1-23-51 are in my hand. Of course, I am not a handwriting expert, but it doesn't seem to me that these figures are in my

(Testimony of Cosby M. Newsom.)

hand. However, I did have a rough work sheet with these figures, or similar figures for the date 1-23-51, for the alarm setting record. Why they are on the 1950 sheet, I do not know, but I do not believe that is my work.

Trial Examiner Myers: Did you put Webb's name in there?

The Witness: I don't believe that is the piece of paper I did that on. This is the smooth log. I don't believe I transcribed these figures in here and I do not believe I put Webb's name in there.

There was some incident about Webb between Shroble and I with the work sheets.

Trial Examiner Myers: Did you erase that?

The Witness: I do not know.

Q. (By Mr. O'Brien): With reference to page 13, I think you have already explained page 13?

A. No, sir, there is one circle here, it says, "See No. 10." That is on page 1, the calorimeter.

Q. I believe you discussed that?

A. No, sir, I don't believe I made the main point on that.

The letter "N" in the row indicates the work that was done, and it is my belief that inasmuch as we had read a standard gas calibration on the instrument within a month or so that Mr. Warden told me to hold off until he got a chance to come down to Silver Gate. That he and I would acquaint Mr. Fowler and Mr. Shroble with the procedure. They were the only two who had not gone through that procedure.

He said, "Hold that open. We will catch it at

(Testimony of Cosby M. Newsom.)

a later date." Mr. Warden said that to me.

Q. With reference to Mr. Warden's criticisms on page 14 and page 15, what do you have to say about that?

A. I believe that was covered when I first discussed page 1. The column under 1-15-51 were written down on a work sheet and the date was merely carried over in transcription. The nature of the taking of the alarm and the manner makes them an ideal. You can check a couple of alarms in 20 minutes, but you can't take a combustion check in 20 minutes. So they were taken throughout the 15 days at various times.

Q. In connection with Mr. Warden's charge that you had a definite measured output, did you ever try to limit your output work when you were working for the San Diego Gas and Electric Company?

A. No, sir.

Q. And did you devise any improved method of doing work in the instrument department?

A. Yes, I have.

Q. Would you name one or two of these?

A. One of these is a system of boiler meter calibration that was devised by me. I believe it was in 1949. That is in extensive use among the instrument technicians at the two plants at this time. It was used exclusively throughout the last overhaul and the men in the instrument department have told me it is excellent.

I have also shown drawings to both station chiefs, and at the time I presented the drawings to them they said, "This is an excellent idea."

(Testimony of Cosby M. Newsom.)

Mr. Zitlaw said to me, "Newt, if there is anything special you need to get this system operating, if there is any special equipment that I can get for you that will hasten this along, just let me know and we will have it in a twinkling."

Q. Did you ever have the job of leadman?

A. No, sir.

Trial Examiner Myers: Were you ever offered the job of leadman?

The Witness: No, sir, I never was.

Q. (By Mr. O'Brien): Do you recall the testimony of several witnesses that you requested a meeting of all instrument technicians so that you could put Mr. Warden on the spot or on the carpet? Do you recall that testimony? A. Yes, I do.

Q. Do you now recall what you did say in that connection?

A. I said, "This does not only concern me, it concerns every man in the department." Due to the fact that we were organizing, therefore, this concerned all of them. I said I would like to have them have a hand in this and be in it from the start. [399]

I asked Mr. Kalins if it would be possible to repeat the little session we had just gone through in the presence of the rest of the fellows as it concerned them very much.

Q. I am not asking you to repeat the testimony. We have been over that a great deal.

Do you recall that you wanted this meeting to put Mr. Warden on the carpet? A. No, sir.

Q. Anything like that? A. No, sir.

(Testimony of Cosby M. Newsom.)

Trial Examiner Myers: Did you make that statement?

The Witness: No, sir, I did not.

Q. (By Mr. O'Brien): Do you recall Mr. Warden's testimony about your being absent for three days without leave? A. Yes, I do.

Q. Did that happen?

Trial Examiner Myers: He said he telephoned to somebody.

The Witness: That was a different instance. At that time I lived a mile and one-half from a telephone.

Trial Examiner Myers: What time was this?

The Witness: It was prior to June, 1950. Just prior to June, 1950, I believe, or around June, 1950. I lived a mile and one-half from a telephone, we had a small child, and my wife did not drive. To my recollection, I was absent two days. Mr. Warden came out to see me and said he was worried about me, asked me when I would be back to work, and I told him the next day. At that time I was sitting in the shade.

Q. (By Mr. O'Brien). Did Mr. Warden have anything to say to you about your absence?

A. No, sir. He said he was glad to hear I was all right and would be back to work the following day.

Q. You heard the testimony about your horseplay at Station B. Was that testimony substantially correct?

A. Well, as I remember, there was and probably always will be horseplay at Station B. Mr. Webb

(Testimony of Cosby M. Newsom.)

and I, I will say, indulged in nothing hazardous or dangerous. We had nothing to do with the sign on the storeroom. I laughed at the time, but so did everyone else.

Trial Examiner Myers: What was on the sign?

The Witness: The sign said—first, I better set the scene. The storeroom is a counter with a wire grill above the top and that lets down so they can secure it at night. It has a slightly cagey atmosphere and the sign said, if I remember correctly, "Please do not feed the animals, they are working for peanuts." I was amused at that.

Q. (By Mr. O'Brien): Did you hear the testimony this morning something with relation to differential gauge and traveling screens?

A. Yes, that was a new installation, and I remember I had some trouble with it. I was relatively new at Silver Gate, and it is a differential meter. In other words, you measure the height of the water before the screens and after the screens, and it was assumed by the instrument manufacturer that the water was going to be clear.

If the screens clog, the water would naturally be higher before the screens than after the screens. In normal operation the water was piling on the other side of the screen and therefore, I moved the zero setting up to two and set the alarm correspondingly at that time.

At that time the meters were not hooked up to automatically start the traveling screens in case they were clogged up. They were merely there as indicators and they did sound the alarm.

(Testimony of Cosby M. Newsom.)

Now, what I did, because of the fact that they were reading a negative, and there was no provision on the chart for negative reading, was to move the zero setting up to what was commonly the two-inch position. I believe I informed Mr. Warden what I had done and he said, "That is as good as we can do now, until we can check the depth of the pipes that are under the water," and we left it at that.

He told me to attach a little sticker to the meters to inform the operators of the fact that two was really the zero position and below two was a negative reading. Above two indicated some clogging of the screens. [402]

That I did and it worked along fine until we were able to iron out the entire situation.

Q. Did Mr. Warden criticize your work in any way on that? A. No, sir, he did not. * * * * *

Cross Examination

Q. (By Mr. Luce): Mr. Newsom, will you turn to page 1 of Respondent's Exhibit No. 2. Where on the calibration sheet is a corresponding space to enter the figure 4?

A. The check should be entered on the calibration sheet.

Q. Yes. Page 13, is that it? A. Yes.

Q. Why didn't you check to show the completion of that work on the calibration sheet, page 13 in this exhibit?

A. As I said before, about the Silver Gate routine sheet, this is a sheet that guided my work

(Testimony of Cosby M. Newsom.)

throughout the month. To be perfectly correct I would have recorded it here on the Silver Gate routine check. I would have placed my initial on the calorimeter sheet and I would have also made a note in the log to the effect that the work was done.

Mr. Warden was not requiring me to note this work in the log. He said that the indication here is sufficient enough. He said that is needless repetition.

Q. When did Mr. Warden say that? [403]

A. When we set this routine up, which would be immediately prior to January 15th, 1951.

Q. There was a space that is circled on page 13 for your check mark? A. Yes, there is a place.

Q. The only reason you didn't put the check mark, you say, was because it would be a needless repetition?

A. I don't say it would be needless, but it would be a repetition. There is one record of the work. I could have gone back later and filled these in.

Q. Why didn't you make the check mark?

A. It was probably inconvenient at the time. The door to the cabinet, where the sheets are kept, sticks, and it may or may not have been there. It was used daily by Mr. Shroble and Mr. Fowler, and I had no way of knowing that the sheet was even there.

Q. I understand, then, you don't know whether the sheet was there or not? No, sir.

Q. So you made no effort to make that check on page 13 at that time? A. I did not.

Q. That was because it was inconvenient?

A. No, sir. It was inconvenient, but I had my

(Testimony of Cosby M. Newsom.)

record here on this Silver Gate routine. This is my record, page 1 of your exhibit. There is a check mark there. [404]

Q. Would anybody reading this Sheet No. 13 have known whether you completed the calibration or not?

A. Let me ask you where are the check marks on this page 13 from 1 to 11? Who was taking the daily readings during that time? I don't know whether the work was completed during these months. There is no indication of that on any sheet.

Q. I believe I understood you to say, to be correct, you should have made the checks on page 13?

A. I said that.

Q. And that is correct, is it not?

A. Substantially.

Q. So that No. 13 is not checked because it does not contain the check marks showing the completion of that work?

A. There is quite a bit wrong with sheet No. 13. Shall I tell you what is wrong with it?

Q. I asked you——

Trial Examiner Myers: Was the calibration completed during the month of January, 1951?

The Witness: Yes, it was. The work was done.

Q. (By Mr. Luce): Is not marking it on the calibration sheet, which is No. 13 in this exhibit, part of your job?

A. Keeping records of the work done is part of your job.

Q. Making the entries on page 13 is part of your job?

(Testimony of Cosby M. Newsom.)

A. Yes. Now, as to the figure 8 that is circled——

Trial Examiner Myers: Is that on page 1?

Mr. Luce: Page 1. [405]

Q. (By Mr. Luce): That was criticized by Mr. Warden because the work was started on the 15th of January, 1951, and wasn't so indicated, is that not true?

A. I believe that is what he said.

Q. What is your explanation as to that?

A. When Mr. Warden drew up the routine, he said "Mr. Newsom, the fact that work is shown on here slated to commence on a certain day is not a hard and fast rule. You will find a day perhaps when, according to your routine sheet, you are supposed to start a turbine test. It may be possible for you to perform this test. It may be impossible for the station chiefs to give you the desired conditions to take the test. Therefore, you must consider this as a rough plan. It is elastic. If you are not able to take care of the turbine test and you have to move it to another day, you are perfectly justified in doing some other work on that day.

"The only thing I want you to do is keep your dates straight as to what was done on what date."

Q. When did Mr. Warden say that to you?

A. He said that to me when he drew up this sheet, and also when he drew up the sheets for the three months routine I handled at both stations some months previously.

Q. Was someone else present?

A. There was no one else present, but it is common sense.

(Testimony of Cosby M. Newsom.)

Q. Are you stating it because it is common sense or because [406] Mr. Warden said it?

A. He said that to me.

Q. Those are his exact words?

A. If I recall, yes, sir.

Q. Do you remember them?

A. I remember them.

Q. You didn't say what date you did the work on, did you?

A. Do you mean the alarms?

Q. Yes, the one that is checked, No. 8. You have No. 8 checked on page 1.

A. It is checked and the figures are also recorded on Unit I, 1951 alarm setting record.

Q. Do you show the date when you did that work?

A. The date heading the column is 1-15-51.

On that date I took the drum level, high and low, reading for Mr. Merrill. Also the steam pressure and the steam temperature readings for Mr. Merrill. I believe the rest was spaced throughout the month from the 15th to the 31st.

Q. Or the 23rd?

A. Possibly I completed all the alarms on the 23rd.

Q. You say possibly? A. I say possibly.

Q. You don't know whether you did or not?

A. I completed that.

Q. You don't know what date? [407]

A. Before February 14th.

Q. Is that the best you can tell us?

Trial Examiner Myers: Where is the corresponding figure to the No. 8, what page of this exhibit?

(Testimony of Cosby M. Newsom.)

The Witness: Do you mean where I entered the work?

Trial Examiner Myers: Yes.

The Witness: The records would be on page 14, the 1951 alarm setting record.

Trial Examiner Myers: Where would it be? Alongside of 23?

The Witness: It would be in the column headed 1-15-51.

Trial Examiner Myers: Where is that?

The Witness: They are all written in order.

Trial Examiner Myers: What is this 23 here on the left-hand side, along with the other numbers, 15, 16, 17, and so forth?

The Witness: Those are days of the month.

Trial Examiner Myers: Where does No. 8 come in? Did you do it on the 23rd day of the month?

The Witness: I did it by the 23rd of the month. I used it as a fill-in job because in assisting the electrician I was forced to start it on the 15th and I let these figures stand.

Trial Examiner Myers: Where did you transpose the figures?

The Witness: On page 15. They run down the page opposite [408] the days.

Trial Examiner Myers: What does Figure 8 mean?

The Witness: Figure 8 refers to page 3. Item 8, page 3 of the exhibit, is "Check all alarms."

Trial Examiner Myers: I see.

Q. (By Mr. Luce): Now, Mr. Newsom, your

(Testimony of Cosby M. Newsom.)

page 1 of the record shows that you did this work, checked the alarms, No. 8 on the 23rd day, is that not correct? A. Yes, it is checked there.

Q. Then on page 14, you show that you did it on the 15th of January, is that not right?

A. I didn't do it on any particular day.

Q. You entered it on the exhibit on page 14 as though you had done it on the 15th of January.

Trial Examiner Myers: Couldn't all this work on page 14 be completed in one day?

The Witness: Yes.

Trial Examiner Myers: Did you complete all the work in one day?

The Witness: I probably did.

Trial Examiner Myers: To whom does this chart, which is page 14 of Respondent's Exhibit No. 2, go to?

The Witness: That is filed in a notebook called "Records for the Station."

Trial Examiner Myers: It is kept as a permanent record? [409]

The Witness: Yes.

Trial Examiner Myers: In whose custody is it, the station chiefs?

The Witness: No, sir, it is merely in a rack in the instrument engineer's office at Silver Gate.

Trial Examiner Myers: Is that a final and complete chart?

The Witness: Yes.

Trial Examiner Myers: To which everybody can refer when tests have been run?

(Testimony of Cosby M. Newsom.)

The Witness: Yes.

Trial Examiner Myers: What about page 1 of the exhibit, what happens to that paper?

The Witness: It goes into a file.

Trial Examiner Myers: In whose custody?

The Witness: Same station, same file and same office? [410] * * * * *

Q. (By Mr. Luce): Mr. Newsom, calling your attention to page 5 of Respondent's Exhibit No. 2, the blank spaces circled there, you say you didn't enter the percentages in there because it would be just a duplication?

A. Yes, I checked that before I entered the 16 and 21.

Q. But at the time when the readings were taken, 10:00, 10:10, 10:20 and 10:30, you say because the readings would be the same it was not necessary to enter them?

A. I say it would not have been any clearer to me had I written 16 down 32 times and 21 down 32 times in order to fill the space up.

Q. I didn't ask you "in order to fill the space up," but shouldn't you have entered the reading at 10:10 in the same manner you did at 10:00?

A. That is not necessarily done. If there had been any change in the burner position or the register setting, I would have noted it.

Q. Will you turn to page 6, please. There are numerous instances on page 6 when you repeated the same figures right across the column from 12:50 to 1:20 when they were the same numbers? [413]

A. What is that, sir?

(Testimony of Cosby M. Newsom.)

Q. Isn't that the proper way to do it, if it is the same figure?

A. The figures here that correspond on the previously mentioned sheet are No. 4 burners; registers, 13, 14, 12 and 12, also burner position 17. I let the one set of figures hold.

Trial Examiner Myers: What the Judge says, for instance, the second line on that page, is 390, 390, 390 and 390.

The Witness: That 390 is a process that is liable to change, therefore, I read it four times at ten-minute intervals.

Trial Examiner Myers: How about on the sixth line, there are figures 227, 227, 227 and 227?

The Witness: Yes, that remained the same, although it is static by nature.

Trial Examiner Myers: The Judge wants to know why, as long as you did that on page 6, you didn't fill in the figures 16 and 21 on page 5. Is that your question, Judge?

Mr. Luce: Yes.

The Witness: Well, the burner position and the registered notches are constant, they are not subject to change without human manipulation. The figures the Judge referred to on page 6 are subject to change without human manipulation.

Q. (By Mr. Luce): Wouldn't your sheet have been incorrect on page 5 unless you did make the entries in there of the [414] readings obtained at the hours mentioned?

(Testimony of Cosby M. Newsom.)

A. The Burner No. 1 position notches open and the register are not readings.

Trial Examiner Myers: Would anybody who is familiar with the sheet, who is familiar with the work done by the instrument men, know what 16 and 21 meant without filling in the rest of the blanks?

The Witness: Yes, that is common practice to do that. [415] * * * * *

Q. (By Mr. Luce): Isn't this procedure on this test that one tester is on the floor and the second tester is in the basement? A. Yes.

Q. And the sheets that the testers are using are exactly the same? A. Yes.

Q. And when the test was completed it was your duty to take the test sheet made by Fowler, whoever was in the basement, and write it on your test sheet the figures that he obtained below, is that not correct? A. That is correct.

Q. And average them up in the last column?

A. Yes.

Q. So that if there were any blanks on Fowler's sheet, it would be your duty to correct that by having him place the proper figure there, would it not?

A. I wouldn't ask him to place the proper figure there because he wouldn't have any way of knowing what the proper figure was after the test was over.

Trial Examiner Myers: I guess you didn't understand the question. If Mr. Fowler didn't give you certain figures, the Judge wants to know if it would be your duty to obtain and insert those figures.

(Testimony of Cosby M. Newsom.)

The Witness: Yes, it was my duty to do that.

Q. (By Mr. Luce): Now, the reading after the circle psi 7.6 is not correct, is it? That is, that isn't 7.6 pounds per square inch?

A. That refers to inches of mercury, negative pressure.

Q. It does not refer to pounds per square inch, then? A. It does not.

Q. Why didn't you scratch out the psi and put in inches mercury?

A. It was an oversight. It was also an oversight that it was printed pounds per square inch.

Q. You had a lot of these blanks?

A. Yes.

Q. You knew that it was your duty to scratch out psi and put in inches of mercury?

A. Everyone knows that.

Q. Yes. Now, on page 8, the same thing occurs, does it not, psi 7.6? [417] A. Yes.

Q. That same answer goes to that point on page 8, does it not? A. Yes.

Q. Now, you say that also on page 8 these pump numbers are wrong? A. Yes.

Q. Why weren't they changed?

A. If I recall, I stapled this sheet to the basement sheet and filed these in the Silver Gate file after sending a copy to Mr. Kalins at Station B. That is my belief.

Now, it probably wasn't designated on Mr. Fowler's sheet, which is not present here. It may or may not have been designated.

(Testimony of Cosby M. Newsom.)

Trial Examiner Myers: Well, the point is you should have changed No. 1 and No. 2 to No. 3 and No. 4?

The Witness: Yes, it is obvious.

Trial Examiner Myers: Would the omission of the change confuse anybody who is familiar with these forms or tests?

The Witness: No, anybody connected with Unit II knows that the C.W. pumps are numbered No. 3 and No. 4. Any mechanic or helper in the plant knows that.

Q. (By Mr. Luce): That is your conclusion, is it not? You don't know what the mechanics know and do not know?

Trial Examiner Myers: I believe he could from his [418] experience.

Did you work with these people?

The Witness: Yes, I did.

Trial Examiner Myers: Did I understand you correctly that there is no pump No. 1 or No. 2?

The Witness: There is no C.W. pump 1 or 2.

Trial Examiner Myers: It is designated as No. 3 and No. 4?

The Witness: Yes.

Q. (By Mr. Luce): Are not these sheets used by others than the mechanics and the men in the test department?

A. The sheets are not used by the mechanics at all. They go to my superiors. All of them, as they have testified, but the instrument technician junior

(Testimony of Cosby M. Newsom.)

engineer, concern themselves with the tests of this nature.

Q. Aren't the sheets examined by others than your immediate superiors?

A. I don't believe they get out of the efficiency engineer's scope.

Q. What about pump manufacturers and their representatives? Would they not examine the sheets? A. I don't know.

Q. At the bottom of page 9 there are some blanks circled, and I believe you said they pertain to Mr. Fowler's sheet or the sheet used by the basement man? [419]

A. I would say they did not probably appear on his sheet. If they had appeared on his sheet, I am sure that his sheet would be attached to this and be a part of your exhibit.

Q. Would you have copied them on this Sheet No. 9?

A. I cannot see why I would have left them off.

Q. In other words, what you mean to say is that you would have copied them if they had been on the basement sheet?

A. If they had been on there at the time I copied it, the chances are I would have copied it.

Q. If you noticed the absence or the failure to enter that, would you not have called it to Fowler's attention or had it reread?

A. As I said, the test comprises separate sheets. Everything pertaining to the test was on these two sheets. I probably transcribed everything on these

(Testimony of Cosby M. Newsom.)

two sheets to a third sheet which was the official sheet that went to Mr. Kalins at Station B.

If these two sheets were together, there would be contained all the information necessary to assume——

Q. As a matter of fact, you are not supposed to send a third sheet to Mr. Kalins?

A. I am supposed to send averages of all the readings we take on the turbine tests to Mr. Kalins immediately.

Q. That is a third sheet? [420]

A. I have said a third sheet. I have, at times, sent the first sheet, but when I do that I make sure that all the figures are on both sheets are averaged.

Q. As a matter of fact, the complete test should be on the sheet, page 9, shown here, should they not?

A. No, sir, I wouldn't say it was necessary for the entire test to be on this sheet. It had been stapled to another sheet and it seems to me if this was the top sheet it would appear in the upper right-hand corner the designation of the additional test number.

It is quite possible the figures written up smooth were written on the other sheet.

Q. You yourself wrote the word N-E-W-T?

A. Yes.

Q. Is that supposed to be your signature?

A. Yes.

Q. It means that you have made the test?

A. Yes.

Q. That it is complete? A. Yes.

Q. On page 12 you state that the figures in the

(Testimony of Cosby M. Newsom.)

column under 1-23-51 are or are not in your handwriting?

A. It doesn't look like my hand to me when I compare it to the handwriting in the two adjacent columns.

Q. You know whether the figures are made by you, do you not? [421]

A. I don't believe these figures are mine.

Q. You say that after comparing them with the figures in the column under "C.N." and "Newt"?

A. Yes.

Q. Now, you don't have any recollection about the facts?

A. I have a recollection of taking down these readings on the work sheet. I have no recollection of recording them on the 1950 Unit II alarm setting record. [422]

* * * * *

RESPONDENT'S EXHIBIT No. 2

#1.

S. G. Routine Jan 51

DATE	weekly	TWICE MONTHLY	MONTHLY	
15		2.5.		
16		1.4.	9. Hi.	
17				
18			3. (345)	
19	1-(4)			
20	—			
21	—			
22			7.	
23			(8.)	This item was started on 1-18-51 and not so indicated.
24			(10.)	
25				
26	1-(4)			
27	—			
28	—			
29				
30				4½ Quad meds.
31			5.6.	

Respondent's Exhibit No. 2 (Continued)

SILVER GATE

ROUTINE WORK

WEEKLY WORK:

1. Drain control Air Filters.
2. Take Head Tank samples and send to Sta. B. Lab.
3. Check water test stations.
4. Calorimeter.

Note:

Items 2&3 are to be done by the regular man at the Station.

SILVER GATE

ROUTINE WORK

MONTHLY WORK:

1. [illegible]
2. [illegible] after stop Valve Steam Pressure [illegible] on all Turbines.
3. Make top load combustion checks on all Boilers (after 8 months boiler operation increase checks to twice monthly).
4. Check control air reducer operation.
5. Send city water composite to Sta. B. Lab.
6. Take Turbine Lub. Oil samples and send to Sta. B. Lab.
7. Check Sol-u-Bridge.
8. Check all alarms.
9. Turbine Test.
10. Calorimeter.

Exhibit No. 2 (Continued)

Test SG 4-51

SILVER GATE

TYPE RB BOILER CHECK (Sheet 1 of 2)

No. 5 Date 1-18-51 Observers Nevitt/Fowler

		10 AM	10 AM	10 PM	10 PM
w	M#/hr	555	554	554	554
am Press	Psig	1240	1240	1240	1240
r Flow (Steam)		620	620	620	620
Flow, South	M#/hr	—			
	#/hr	36	36	36	36
r Flow (Oil)		40	39.5	39.5	40
er Flow	M#/hr	535	535	535	534
r Final Temp	°F	446	446	446	446
r Press Meter	Psig	1900	1900	1900	1900
, Final	CF/hr	—			
r Flow (Gas)		695	694	694	696
Flow, North	M#/hr	123	121	121	120
mp, Final	°F	950	950	950	950
in Tem., North	°F	860	860	860	860
Out Temp, North	°F	780	780	780	780
rehtr, North	°F	844	844	844	844
Prehtr, North	°F	665	665	665	665
Prehtr, North	°F	345	345	345	345
el	In.	+8	+8	+8	+8
rehtr, South	°F	841	841	841	842
Prehtr, South	°F	680	680	680	680
Prehtr, South	°F	356	357	358	358
htr Out	°F	960	960	959.5	959.5
in Temp, South	°F	864	864	864	864
out Temp, South	°F	722	722	722	722
Control Press, South	Psig	11	11	11	11
Control Press, South	Psig	2	1	1	1
trol Press, South	Psig	18	18	18	18
trol Press, South	Psig	18.5	18.5	18.5	18.5
r Control Press	Psig	12	12	12	12
l Control Press	Psig	18.5	18.2	18.5	18.5
ter Control Press	Psig	18	18	18	18
l Control Press	Psig	—			
ss. Control Press	Psig	—			
Control Press	Psig	17.5	17.5	17.5	17.5
trol Press., North	Psig	17.5	17.5	17.5	17.5
trol Press, North	Psig	19	19	19	19
Control Press., North	Psig	4	4	4	4
Control Press, North	Psig	11	11	11	11
Diff Press, North	Psig	7	7	7	7
er Press, Gage	Psig	1950	1950	1950	1950
rum Press	Psig	1330	1330	1330	1330
Diff Press, South	Psig	30	30	30	30
Prehtr Draft, South	"h_2o	+12	+12	+12	+12
Prehtr, Draft, South	"h_2o	+7.5	+7.5	+7.5	+7.5
Prehtr Draft, South	"h_2o	-4.5	-4.5	-4.5	-4.5
Prehtr Draft, South	"h_2o	-6.5	-6.5	-6.5	-6.5
Draft	"h_2o	+.24	+.2	+.2	+.2
Draft Diff	"h_2o	3.6	2.6	2.6	2.6

SILVER GATE

TYPE RB BOILER CHECK (Sheet 2 of 2) Test SG 4-51

IR No. Date 1-18-51 Observers Neut/Fowler

mizer Draft Diff	"H_2O	10 00	10 10	10 20	10 30			
n Prehtr Draft, North	"H_2O	1.5	1.5	1.5	1.5			
ut Prehtr Draft, North	"H_2O	11.8	11.9	11.8	11.8			
n Prehtr Draft, North	"H_2O	7.8	8	7.9	7.9			
ut Prehtr Draft, North	"H_2O	4.6	4.6	4.6	4.6			
as Press	Psig	6.3	6.2	6.2	6.2			
Gas Orif Press	Psig							
r Gas Press	"Hg							
Oil CD Disch Press	Psig	811	810	810	810			
an Speed, South	RPM	720	720	720	720			
ne Load	Kw	62.5	62.5	62.5	62.5			
Fan Speed, North	RPM	680	680	680	680			
r Gas Manometer	"H_2O							
ce Gas Press, North	Psig							
ce Gas Press, South	Psig							
ne Throttle Press	Psig	1252	1252	1252	1252			
Oil Temp	°F	211	211	211	212			
Oil Main Press	Psig	272	275	274	275			
Oil B.P. Disch. Press	Psig	665	665	668	666			
fore Control Valve Press	Psig							
ter Control Valve Press	Psig							
low, North	CF hr							
low, South	CF hr							
low, North		93	94	94	94			
low, South		90	90	90	92			
mizer in Temp	°F							
mizer out Temp	°F							
r No. 1 Reg Notches	Open	16						
" Position	Inches	21						
No. 2 Reg Notches	Open							
" Position	Inches							
No. 3 Reg Notches	Open							
" Position	Inches							
No. 4 Reg Notches	Open							
" Position	Inches							
No. 5 Reg Notches	Open							
" Position	Inches							
No. 6 Reg Notches	Open							
" Position	Inches							
No. 7 Reg Notches	Open							
" Position	Inches							
No. 8 Reg Notches	Open							
" Position	Inches							
ass CO_2	%	13.6	13.8	14	13.8			
" $CO_2 + O_2$	%	16.4	16.6	16.6	16.8			
" O_2	%							
" $CO_2 + O_2 + CO$	%							
" Excess Air	%	14	14	13.	15.			
TO RET	PSI	510	510	510	511			

12.5

ent's Exhibit No. 2 (Continued)

TEST NO. SG-4-

SILVER GATE STATION

Boiler No. 3 & 4

Date 1-18-5

Observer Hewitt

BOILER CHECK TEST

	#3				#4			
Time	1259	1400	1510	1620	2115	2225	2330	2445
Steam Flow	300	301	302	302	300	300	300	299
Air Flow	390	340	390	390	364	364	364	364
F.W.Flow	300	302	302	300	393	392	390	390
Water Level	0	0	0	0	0	0	0	0
Gas Flow								
Air Flow	227	227	227	227	219	219	219	219
F.O.Flow	220	220	220	220	219	219	219	219
F.W.Temperature	382	382	382	382	382	382	382	381
F.Gas to Htr. Temp.	805	807	808	808	740	740	740	740
Air from Htr. "	525	525	525	525	538	538	538	538
F.Gas from Htr."	470	470	470	470	425	425	425	425
Steam Temp. Main	900	900	900	900	900	900	900	905
" " to Attemp.	785	785	780	780	780	780	780	780
" " from Attemp.	705	715	715	710	725	725	725	725
Draft. Air to Htr.	12.9	13	13.2	13.2	15+	15+	15+	15+
" Air from Htr.	10.9	11	11.2	11.	14.1	14.7	15.5	15.5
" Furnace	.46	.38	.3	.4	-.5+	-.5+	-.5+	-.5+
" Gas to Htr.	4.5	4.4	4.6	4.6	5.4	5.4	5.5	5.3
" Gas from Htr.	8.6	8.3	8.5	8.2	9.1	9.2	9.	9.2
F.W.Press	1350	1350	1350	1350	1355	1355	1355	1355
Steam Press. Drum	920	915	912	915	910	910	910	912
" " Orifice	920	920	920	920	875	875	875	878
" " Hdr.	860	860	860	860	860	860	860	860
Control Press. F.W.	15.6	15.6	15.6	15.5	14	14	14	14
" " Attemp.	18	17.5	17.4	18	21.5	21.5	21.5	21.8
" " Gas P.								
" " Oil Fuel	25	25	25	25	23	23	23	23
" " I.D.	21.5	21.5	21.4	21.4	23.4	23.4	23.3	23.3
" " F.D.	22.	22.	22.	22.2	28.5	28.5	28.5	28.5
" " Gas Fuel								
F.O.Press to Burner	750	750	750	750	745	745	745	745
" " from "	440	440	440	440	455	455	455	455
" " Hdr.	275	275	275	275	275	275	275	275
F.O.Temperature	210	210	210	210	216	216	216	216
Gas Press Burner								
" " Orifice								
" " M.N.								
" " Hdr.								
No. Burners	4				4			
Registers	3 1/4							
Burner Position	12"							
Conductivity								
CO2	16.2	14	14	14	13	12.8	12.8	12.8
CO2+O2	16.6	16.4	16.6	16.6	17.2	17.	17.1	17.2
CO2+O2+CO								
Excess Air	12	12	13	13	21	21	21.5	22.
REMARKS:								
Preheater Gas Mid	6.8	6.5	6.6	6.5	7.1	7.1	7.2	7.

19% oil 12% Gas

Respondent's Exhibit No. 2 (Continued)

SB-3-51

#7

SILVER GATE STATION
TURBO-GENERATOR CHECK TEST

DATE 1-16-51 OBSERVER Mewt

							AVg
		✓10:05	10:15	10:23	10:35		
	MKW	✓40	40	40	40		40
re	MKvar	✓5.3	5.2	5.5	5.4		5.4
Temperature	°C	✓62	62	62	62		62
Temperature	°C	✓37	37.2	38.2	37.9		37.7
Pressure	in.H2O						53
lyser	%						98.7
Gas Pressure	in.H2O						26.5
er	in.Hg.	✓30.27	30.27	30.27	30.27		30.27
	in.Hg.	✓28.95	28.95	28.95	28.95		28.95
t Pressure	in.Hg.						
tion Temperature	°F						
Flow, Mtr.	MLb/hr.	✓360	360	360	360		360
Temp. Mtr.	°F	✓905	905	905	905		905
Press. Mtr.	psi	✓847	847	845	848		847
team Press.	psi	✓852	852	855	855		853
re Press.	psi	✓579	580	580	580		580
" "	psi						460
" "	psi	✓205	205	205	205		205
" "	psi	✓102	102	102	102		102
" "	psi	✓17	17	17	17		17
" "	psi	7.6	7.6	7.6	7.6		7.6
t Temperature	°F	✓94	94	94	94		94
mp #2 Disch.Press.	psi						83
l Temp.	°F						88
Coolers, Temp.	°F						94
r Ejector, Temp.	°F						96
P.Htr., Temp.	°F						196.5
tor Water Temp.	°F	✓268 →					260
tor Vapor Temp.	°F	✓268 →					260
P.Htr., Temp.	°F						310
P.Htr., Temp.	°F						380
kage	cfm	LESS	THAN	.925			-.925
						?	260.5
							96
r.Drain, Temp.	°F						145
r. Drain, Temp.	°F						285
r. Drain, Temp	°F						381
sate Flow	MLb/hr						70
mp. In #1	°F						58
mp. In #2	°F						58
mp. Out #1	°F						72
mp. Out #2	°F						73
mp #1 Disch. Press.	psi						4.55
mp #2 Disch. Press.	psi						3.25
mp # 2 Disch.Press.	psi						1210
mp # 2 Flow	MLb/hr						358

Respondent's Exhibit No. 2 (Continued)

LVER GATE STATION
TURBO-GENERATOR CHECK TEST

DATE 1-16-51 OBSERVER Mewt

		12:00	3:00	3:10	3:20	AVGS
	MKw	✓ 60	60	60	60	60
Vars	MKvar	✓ 26	26	25.5	25.5	25.7
or Temperature	°C	✓ 69	69	70	70.5	69.1
Temperature	°C	✓ 70.5	70.5	70.5	71	70.6
n Pressure	in.H2O					1.6
Analyser	%					95.4
ine Gas Pressure	in.H2O					23.6
meter	in.Hg.	✓ 30.27 →				30.2
um	in.Hg.	✓ 29.5	29.5	29.5	29.5	29.5
ust Pressure	in.Hg.					
ration Temperature	°F					
m Flow, Mtr.	MLb/hr.	✓ 539	539	539	539	539
m Temp. Mtr.	°F	✓ 900	900	900	900	900
Press. Mtr.	psi	✓ 845	845	848	848	846
Vapor Press.	psi	✓ 85	85	85	85	851
Steam Press.	psi	✓ 568	568	570	570	869
3RD "	psi	✓ 506	508	509	509	507.
" "	psi	✓ 236	236	237	237	236.
" "	psi	✓ 111	111	111	111	111
" "	psi	✓ 32	32	32.5	32.3	32.2
" "	psi	7.5	2.5	7.5	7.5	7.5
t Temperature	°F	✓ 93	93	93	93	93
Pump #4 Disch.Press.	psi					73
Well Temp.	°F					87
H2 Coolers, Temp.	°F					91
Air Ejector, Temp.	°F					94
L.P.Htr., Temp.	°F					229
rator Water Temp.	°F	✓ 279 →				279
rator Vapor Temp.	°F	✓ 279 →				329
I.P.Htr., Temp.	°F					391
H.P.Htr., Temp.	°F					
Leakage	cfm	Negligible				279
HTR OUT						
						191-
Htr. Drain, Temp.	°F					288
Htr. Drain, Temp.	°F					394
Htr. Drain, Temp.	°F					
ensate Flow	MLb/hr					?
Temp. In #1	°F					58
Temp. In #2	°F					58
Temp. Out #1	°F					73.
Temp. Out #2	°F					72
Pump #1 Disch. Press.	psi					2.3
Pump #2 Disch. Press.	psi					2.0
Pump # 6 Disch.Press.	psi					✓ 40
Pump # 6 Flow	MLb/hr					249
#4 PRESS		out of Service				
#4 FLOW						271

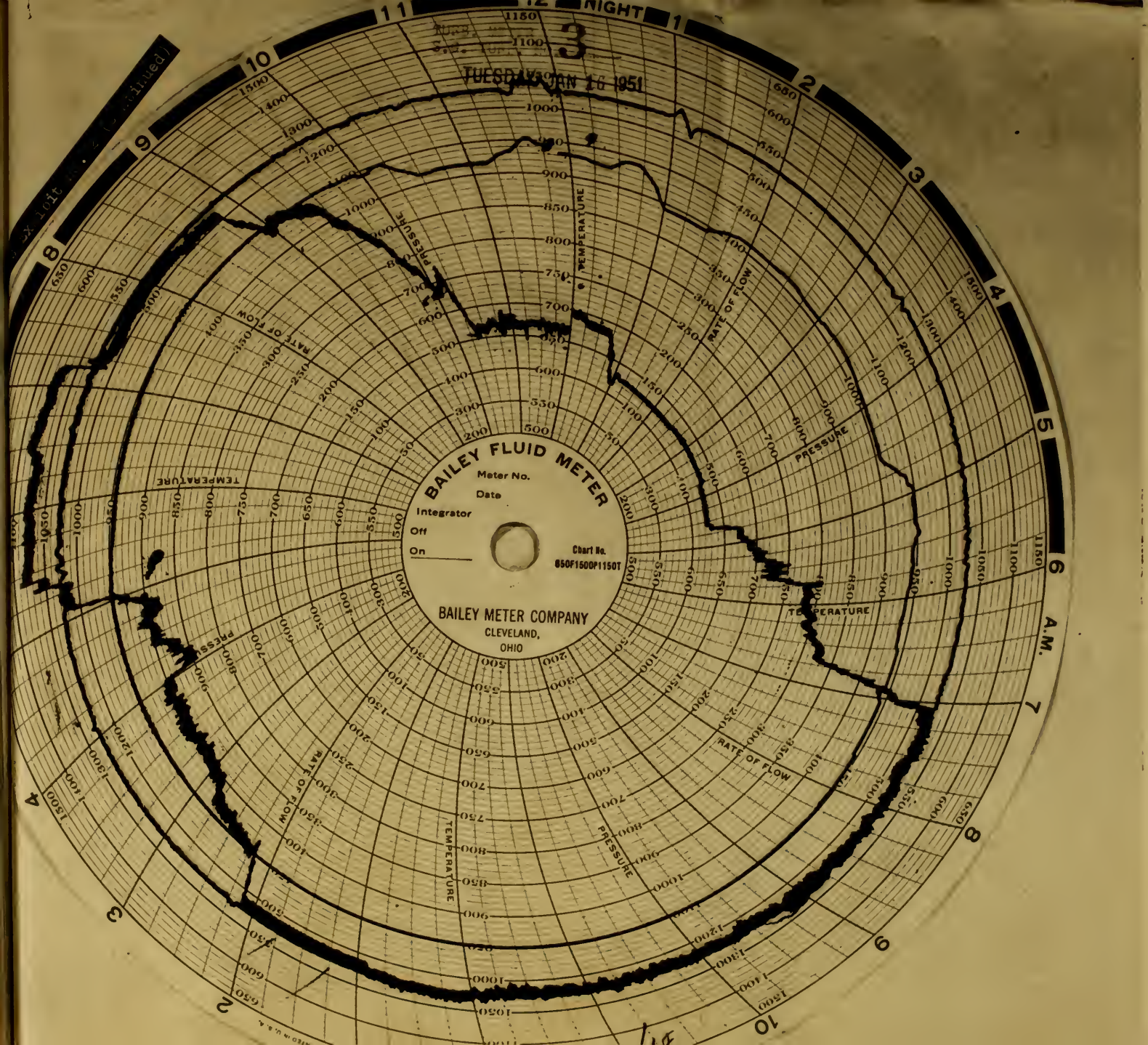
Res Devel't Exhibit No. 2 (Continued)

#7

ALVER GATE STATION
TURBO-GENERATOR CHECK TEST

DATE 1-16-51 OBSERVER Nout

							Avg
		15	22	25	32		
	MKW	60	60	60	60		60
ars	MKvar	20	20.1	20	20		20
Temperature	°C	56.5	56.5	56.5	56.5		56.5
Temperature	°C	61	61	61	60		61
Pressure	in.H2O						1.5
lyser	%						90.1
Gas Pressure	in.H2O						30
er	in.Hg.	30.27 →					30.27
	in.Hg.	29.1	29.1	29.1	29.1		29.1
Pressure	in.Hg.						
tion Temperature	°F						
Flow, Mtr.	MLb/hr.	515	515	515	515		515
Temp. Mtr.	°F	948	948	948	948		948
Press. Mtr.	psi	1250	1250	1250	1250		1250
Steam Press.	psi	1252	1252	1252	1252		1252
ge Press.	psi	868	866	869	869		868
" 3RD	psi	590	590	590	590		590
"	psi	340	340	340	340		340
"	psi	209	209	209	209		209
"	psi	80	80	80	80		80
"	psi	19.3	19.4	19.5	19.4		19.4
Temperature	°F	96	96	96	96		96
IN Hg		9.5	9.5	9.5	9.4		9.5
mp # 5 Disch.Press.	psi						72
Temp.	°F						88
Coolers, Temp.	°F						93
Ejector, Temp.	°F						96
.Htr., Temp.	°F						176
tor Water Temp.	°F	267 →					267
tor Vapor Temp.	°F	264 →					264
.Htr., Temp.	°F						388.5
.Htr., Temp.	°F						435
kage	cfm	Negligible					
LOW IP HTR							270
LOW IP HTR							325
r.Drain, Temp.	°F						188
r. Drain, Temp.	°F						385
r. Drain, Temp	°F						437.5
aste Flow	MLb/hr						58
IP DRAIN	°F						278
mp. In #1	°F						58
mp. In #2	°F						58
mp. Out #1	°F						75
mp. Out #2	°F						73
mp #1 Disch. Press.	psi						
mp #2 Disch. Press.	psi						
mp # 3 Disch.Press.	psi						2020
mp # 3 Flow	MLb/hr						236
3 DISCH PSI							1960
3 FLO MLB/HR							259


NIGHT
TUESDAY JAN 16 1951
BAILEY FLUID METER
Meter No.
Date
Integrator
Off
On
Chart No.
650F1500P1150T
BAILEY METER COMPANY
CLEVELAND,
OHIO
TEMPERATURE
PRESSURE
RATE OF FLOW
A.M.

UNIT #1
ALARM SETTING RECORD
1950

[redacted] Unit No. 1 (Continued)

Date / Alarms	Spec'd Setting	1-16 R.C.	2-24 [illegible]	3-23 R.C.	4-24 R.C.	May 11 R.C.	6-7-50 Hart	7-7-50 C.N.	8-3 R.C.
1. Low Fuel Oil Press.	270	270	270	270	270	270	272	270	270
2. " Gas Press Main.	40				40	40	40		40
3. " " " Stn Hd.	16		16	16	15	15	16		16
4. Hi " " " "	22		22	22	23	23	22	22	22
5. Low Feedwater Press.	1050	1050	1050	1050	1050	1050	1050	1050	1050
6. " Control Air Press. (Blr. Room.)	72		72	72.5	72		72.5		Cross over unit 3
7. " " " " (Bsmnt)	75	74	75	75	75		75		
8. " FO Tank Level #1	2.3	2.2	2.3	2.3	2.3	2.3	2.3	✓	2.3
9. " " " " #2	2.3	2.3	2.3	2.2	2.3	2.3	2.3	✓	2.3
10. " " " " #3	2.3	2.3	2.3	2.2	2.3	2.3	2.3	✓	2.3
11. Hi " " " #1	10.8	10.8	10.8	10.8	10.8	10.8	10.8	✓	10.8
12. " " " " #2	10.8	10.8	10.8	10.8	10.8	10.8	10.8	✓	10.8
13. " " " " #3	10.8	10.8	10.8	10.8	10.8	10.8	10.8	✓	10.8
14. Lo Steam Press.	840	850	845	840	840	840	845	740	840
15. #1 Blr Hi St Temp.	920	918	920	920	920	918	920	920	918
16. #2 " " " "	920	921	920	920	920	920	920	920	918
17. #1 " Hi Drum Level.	+3	+3	+3	+3	+3	+3	3	3	3
18. #2 " " " "	+3	+3	+3	+3	+3	+3	3	3	3
19. #1 " Lo " "	-3	-3	-3	-3.1	-3	-3	3	2	-3
20. #2 " " " "	-3	-3	-3	-3.	-3	-3	3	3	-3
21. Deaerator Makeup On.	4.0	4.0	4.2	4.1	4.2	4.1	4.2	4.4	4.2
22. " " Off.	4.2	4.4	4.4	4.4	4.4	4.5	4.4	4.8	4.4
23. Cond Recorder Hi.	3.5	3.4	3.5	3.5	3.5	3.5	3.5	3.5	3.5
24. H_2 Seal Oil Press Hi.	14		14	15	14	14	14		14
25. " " " " Lo.	5		5	5	5	5	5		5
26. Hi Oil Level Turb.									
27. Lo " " "									
28. Hi Exhaust Temp Turb.									Not Wired
29. Low City Water Press.	50	55	50	50	55	50	47	40	40
30. " " " Pump On.	50	47.5	50	50	55	50/42	47	40	40
31. Hi H_2 Mach Gas Temp.									
32. Lo H_2 Vac Tank.	26		26	26	26	26	26		26
33. Lo H_2 Press to Gen (Lo Press Operation)	10		10	10	10	10	10		10
34. Hi " " " " (" " ")	28		28	27.5	28	28	28		28
35. Lo H_2 Mach Gas Press (Hi Press Operation)	1/4		1/4	1/4	1/4	1/4	1/4		1/4
36. Hi " " " " (" " ")	8		7	7	8	8	8		8
37. Hi St Temp Turb.	910		914	909	908	908	908		905
38. Hi Diff #1 Screens.	4		4	3.9	4	4	4		4
39. Hi Diff Tunnels.	2.5		2	2.5	2.5	2.5	2.5		2.5
40. Hi Generator Rotor Temp.									

UNIT #2
ALARM SETTING RECORD
1950

Respondent's Exhibit No. 2 (Continued)

Date / Alarms	Spec'd Setting	1-16-50 H.S.	2-26-50 [illegible]	3-23 R.C.	4-24 R.C.	May 11 R.C.	6-7 NEWT	7-7 G.N.	[illegible]					
1. Low Feedwater Press.	1200#	1200	1197	1218	1210	1210	1210	1210	1210					140
2. Low Control Air Press Blr Rm	72#	71	72	73	73	74	75		72					
3. Low Steam Press.	850#	840	850	850	850	850	850	850	850					
4. #3 Blr Hi St Temp.	920°	915	920	920	912	910	915	915	920					
5. #4 " " " "	920°	920	920	918	920	918	918	918	920					
6. #3 " " Drum Level.	+3"	+3.1	+3	+3	3	+3	3	3	3					
7. #4 " " " "	+3"	+3.1	+3	+3	3	+3.2	3.2	3.2	3					
8. #3 " Lo " "	-3"	-2.9	-3	-3	-3	-3	3	3	3					
9. #4 " " " "	-3"	-3	-3	-3	-3	-3	3	3	3					
10. Deaerator Makeup On.	5.4"	5.9		5.9	5.9	5.8	6.	5.8	6.1					6.3
11. " " Off.	6.3"	6.9		6.3	6.2	6.3	6.4	6.3	6.4					6.6
12. Cond Recorder Hi.	3.5	3.4	3.4	3.45	3.4	3.4	3.5	3.5	3.5					3.6
13. Hi H_2 Seal Oil Press. Diff. (Turb. End)	8#		8	9	8.5	8.5	8.							
14. Lo " " " " " (" ")	4#		4	3	4	4	4.							
15. Hi Exhaust Temp Turb.	160													
16. Hi Oil Level Turb.														
17. Lo " " "														
18. Hi H_2 Gas Temp.														
19. Lo Vac Tank.	26"		25.8	25.5	25.5	25.5	25							
20. Hi H_2 Press to Gen.	8#		8#	8	8	8	8							
21. Lo " " " "	10"		10"	9"	9"	9	10							
22. Lo H_2 Gas Press (Bottle)	6#		6	5	6	6	4							
23. Hi " " " (")	14#		14	17	16	16	16							
24. Hi St Temp Turb.	910°	910	910	910	910	910	910	910	910					
25. Hi Screen Diff.	4"	4.2	4.2	4.2	4	4	KAPUT	4	4					4
26. Lo FO Booster Press.	610#	612	610	600	610	600	610	610	—					
27. Lo H_2 Seal Oil Press. Diff. (Collector End)	4#		4	3	4	4	3.75							
28. Lo Main Seal Oil Press. (Starts Emerg Pump)	25#		27	25	25	25	25							30
29. Emergency Seal Oil Pump (Closes Valve #40)	25#		28	25	25	25	25							30
30. Low Control Air Press Bsmnt	75#	75	75	74	74	75	75		75					
31. Hi Generator Rotor Temp.														

Condent's Ex Exhibit No. 2 (Continued)

San Diego Gas & Electric Company
Electric Production Department
MONTHLY RECORD OF RECORDING CALORIMETER MAINTENANCE

Station Silver Gate. Serial No. D251141A Month of Jan 1951

Check items as "performed" by entering operator's or technician's mark (see below)

TEST OR ADJUSTMENT	MINIMUM FREQ.	DATE PREV PERFORMED	DAY OF MONTH 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
1. Charted timed & aligned, Ink supply o.k.	Daily		R R R S T A T A T A T A R S R S R S R S W R S R S
2. Galvanometer steady, Clutch not slipping.	Daily		R R R S T A T A T A T A R S R S R S R S W R S R S
3. Water overflow o.k., seals not blowing.	Daily		R R R S T A T A T A T A R S R S R S R S W R S R S
4. Mechanical balance	Weekly	_____	This work shown as done on Work Sheet 1/4 N
5. Ordinary Weekly Mntce.*	~~Weekly~~ Monthly	_____	N
6. Ordinary Monthly Mntce.*	Monthly	_____	N
7. Cold Balance	Monthly	_____	N
8. Std. Gas Calibration	Monthly	_____	Sac #10
9. Air-Gas ratio test	Quarterly	_____	
10. Tank overhaul	Yearly	_____	
11. Recorder overhaul	Yearly	_____	
12. Rheostat setting	Enter reading on day setting is changed.		61.5
13. Aver. tank temp	Daily		Max. 78° Min. 72° 69.8 — 68.8 71.8 72.5 73.5 73 73.1 72.8 72.4 72.7 71.2 68.0

Ordinary Weekly Mntce - Oil tank motor bearings, Grease tank unit gears, Fill auxiliary storage tank, check water in seal drain pot, Empty condensate drip tank, Examine and clean orifices if necessary.

Ordinary Monthly Mntce - Change chart roll, oil bearings above water, Clean inlet & outlet thermometers, replace tank water if dirty, Check pump operation

Note: Use only condensate in calorimeter, do not use city water.

USE THESE MARKS TO CHECK ABOVE

O - Blr Rm Operator
V - Instrument Eng'r
T - Instrument Tech
X - Other _____

TANK AND RECORDER MUST BE OVERHAULED BEFORE

_____

13

Unit # I

1951 ALARM Setting Record

Alarms / Date →	Setting	1-15-51
1. Low Fuel Oil Press.	270#	270
2. " Gas Press Main	40#	
3. " " " Std.	16#	
4. High " " "	22#	
5. Low Feedwater Press.	1050#	1050
6. " Control Air	75#	72
7. Low F.O. tank Level #1	2.3'	2.3
8. " " " " #2	2.3'	2.3
9. " " " " #3	2.3'	2.3
10. High " " " #1	10.6'	10.8
11. " " " " #2	10.6'	10.8
12. " " " " #3	10.6'	10.8
13. Low H2 Press to Gen.	10"	10
14. High " " " "	25"	28
15. Low Steam Press.	850#	840
16. #1 Blr. High Steam temp.	920°	920
17. #2 " " " "	920°	920
18. #1 " High Drum Level	+3	3
19. #2 " " " "	+3	3
20. #1 " Low " "	-3	3
21. #2 " " " "	-3	3
22. Deaerator Make up On	4.0'	4.2
23. " " " Off	4.2'	4.4
24. Conductivity Recorder High	3.5 Mho	3.5
25. H2 Seal Oil Press. High	14#	14
26. " " " " Low	5#	
27. High Oil Level turb.	10"	
28. Low " " "	1"	
29. High Exhaust temp. turb.	160°	160
30. Low City Water Press.	50#	50
31. " " " Pump On	50#	50
32. H2 Mach. Gas temp High	40°C	
33. H2 Vac. tank Low	26" Hg.	
34. H2 Mach. (Hi Press open) Gas Press Low	3#	
35. " " " " " " High	15#	
36. High Steam temp @ turb.	910°	910
37. High Screen Diff.	4	4
38. High tunnel Diff.	2.5	2.5

Unit #2
Alarm Setting Record
195-

Respondent's Exhibit No. 2 (Continued)

Date Alarms	Specified	Note Date 1-23-51
1. Low Feedwater Press.	1200#	1210
2. Low Control Air Press Blr Rm.	72#	72
3. Low Steam Press.	850#	850
4. #3 Blr. High Steam Press	920#	920
5. #4 " " " "	920#	920
6. #3 " " Drum Level	+3"	3
7. #4 " " " "	+3"	3
8. #3 " Low " "	-3"	3
9. #4 " " " "	-3"	3
10. Deaerator Makeup on	5.9'	6.1
11. " " OFF	6.3'	6.4
12. Conductivity Recorder High	3.5	3.5
13. High H_2 Seal Oil Press. Diff. (turb. end)	8#	
14. Low " " " " " " "	3#	
15. High exhaust temp. turb.	160	
16. High Oil Level turb.		
17. Low " " "		
18. High H_2 Gas temp.		
19. Low Vacuum tank	26"	
20. High H_2 Press to Gen.	8#	
21. Low " " " "	10"	
22. Low H_2 Gas Press (B.Hk)	6#	
23. High " " " "	14#	
24. High Steam temp. turb.	910°	910°
25. High Screen Diff.	4"	4
26. Low E.O. Booster press.	610#	
27. Low H_2 Seal Oil Press. Diff (Oil. End)	4#	
28. Low Main Seal Oil Press (Starts Emerg. Pump)	35#	
29. Emerg. Seal Oil Pump (Closes Valve #4)	25#	
30. Low Control Air Press. Basmt.	75#	75

[Endorsed]: No. 13,525. United States Court of Appeals for the Ninth Circuit. National Labor Relations board, Petitioner, vs. San Diego Gas and Electric Company, Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed: September 3, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13525

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SAN DIEGO GAS AND ELECTRIC CO.,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, et seq.), hereinafter called the Act, respectfully peti-

tions this Court for the enforcement of its Order against Respondent, San Diego Gas and Electric Company, San Diego, California, its officers, agents, successors and assigns. The proceeding resulting in said Order is known upon the records of the Board as "In the Matter of San Diego Gas and Electric Company and Cosby M. Newsom, an Individual," Case No. 21-CA-1029.

In support of this petition the Board respectfully shows:

(1) Respondent is a California Public Utility Corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on March 31, 1952, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, San Diego Gas and Electric Company, San Diego, California, its officers, agents, successor and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which tran-

script includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors and assigns, to comply therewith.

NATIONAL LABOR RELATIONS BOARD

/s/ By A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 28 day of August, 1952.

[Endorsed]: Filed Sept. 3, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, the petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board's finding that respondent violated

Section 8 (a) (1) of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. Supp. V, Section 141 et seq.) by interfering with, restraining and coercing its employees in the exercise of their rights guaranteed by Section 7 of said Act, is supported by substantial evidence and is otherwise proper.

2. The Board's finding that respondent violated Sections 8 (a) (3) and 8 (a) (1) of said Act by discriminatorily discharging employee Cosby M. Newsom is supported by substantial evidence and is otherwise proper.

3. The Board's order is in all respects just and proper and a decree should be entered enforcing said order in full.

Washington, D. C.

/s/ A. NORMAN SOMERS,
Assistant General Counsel.
NATIONAL LABOR RELATIONS BOARD

[Endorsed]: Filed Sept. 3, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENT INTENDS TO RELY

In this proceeding, the respondent, San Diego Gas and Electric Company, will urge and rely upon the following points:

1. The Board's finding that respondent violated

Section 8 (a) (1) of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. Supp. V, Section 141, et seq.) by interfering with, restraining and coercing its employees in the exercise of their rights guaranteed by Section 7 of said Act, is not supported by substantial evidence and is otherwise improper.

2. The Board's finding that respondent violated Sections 8 (a) (3) and 8 (a) (1) of said Act by discriminatorily discharging employee Cosby M. Newsom is not supported by substantial evidence and is otherwise improper.

3. The Board's findings are contrary to law.

4. The Board's order is not supported by law.

5. The Board is without authority to issue its order herein.

6. The Board has relied upon testimony improperly admitted in evidence in support of its order.

7. The Board has not jurisdiction to issue the order herein involved.

Dated this 10th day of September, 1952.

LUCE, FORWARD, KUNZEL & SCRIPPS

/s/ By EDGAR A. LUCE,
Attorneys for Respondent.

[Endorsed]: Filed Sept. 11, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF RESPONDENT

To the Honorable, the Judges of the United States Court of Appeals, for the Ninth Circuit:

Comes now the respondent, San Diego Gas & Electric Company, and answers the Petition for Enforcement of an Order of The National Labor Relations Board, heretofore filed herein, as follows, to wit:

(1) Said respondent denies that the respondent did at any of the times referred to in the complaint of Cosby M. Newsom, or in the Intermediate Report and Order of the Trial Examiner herein, or in the decision and order of the petitioner herein, or at any time or place, either interfere with or restrain or coerce any of its employees, or interfere with or restrain or coerce any of its employees in the exercise of any rights guaranteed in Section 7 of the National Labor Relations Act; and respondent further denies that it at any time advised any of its employees that their union or concerted activity placed their job, or any of their jobs in jeopardy; or that it threatened any of its employees with loss of privileges should any such employee persist in union or concerted activity; and further denies that it promised at any time greater benefits to employees, or any of them, or made inducements to cease their union or concerted activity.

(2) Said respondent further denies that it has by any acts discriminated in regard to the tenure of

employment of any employee, or has engaged in any unfair labor practice, within the meaning of Section 8 (a), Subsection (3) of the National Labor Relations Act; and further denies that it has interfered with or coerced any of its employees in the exercise of their rights guaranteed in Section 7 of the said Act; or did thereby engage in any unfair labor practices within the meaning of said Section 8 (a), Subsection (3) of the National Labor Relations Act.

(3) Said respondent further denies that Cosby M. Newsom was discharged by said respondent because of his leadership or participation in the organizational campaign of the instrument technicians employed by said respondent; and further denies that said respondent committed any act of any kind whatsoever or made any threat, or promise, or inducement to prevent or discourage said Cosby M. Newsom from any union activity whatsoever, or from joining any union; and said respondent further denies that it discharged said Cosby M. Newsom in violation of Section 8 (a) (3) and (1) of the National Labor Relations Act; and respondent further denies that it in any way discriminated with respect to the hire and tenure of the employment of said Cosby M. Newsom; and further denies that it interfered with or restrained or coerced any of its employees in the exercise of any rights guaranteed in said Act.

(4) Said respondent further denies that it at any time threatened any of its employees for engaging

in union activity; and further denies that it in any other manner interfered with, restrained or coerced its employee, Cosby M. Newsom, or any other employees, in the exercise of the right to self-organization or to form labor organizations, or to assist the International Brotherhood of Electrical Workers Local Union 465, affiliated with the American Federation of Labor, or any other labor organization.

(5) Said respondent further denies that in the discharge of said Cosby M. Newsom said respondent engaged in any unfair labor act, as set out in said National Labor Relations Act, or in any way violated the said National Labor Relations Act.

(6) Said respondent further alleges that the said Cosby M. Newsom was discharged from his employment with respondent for cause within the meaning of Section 10 (c) of the National Labor Relations Act.

(7) Said respondent denies that the order of the National Labor Relations Board in the proceeding known as "In the Matter of San Diego Gas and Electric Company and Cosby M. Newsom, an Individual", Case No. 21-CA-1029, or the Findings of the said Board, are supported by substantial evidence on the record considered as a whole.

(8) Said respondent further denies that the said petitioner has or had jurisdiction or authority to issue its order referred to in its petition herein.

Wherefore, respondent prays that the said Peti-

tion for Enforcement be denied, and that said respondent have and recover its costs of suit expended herein.

LUCE, FORWARD, KUNZEL & SCRIPPS

/s/ By EDGAR A. LUCE,
Attorneys for Respondent.

Duly Verified.

[Endorsed]: Filed September 15, 1952. Paul P. O'Brien, Clerk.

Marshal's Civil Case Record No. 4920

CA No. 13525

ORDER TO SHOW CAUSE

United States of America, ss:

The President of the United States of America:
San Diego Gas and Electric Co., Att: A. E. Hollaway, President, Electric Bldg., San Diego, Calif., and International Brotherhood of Electrical Workers, Local No. 465, A.F.L., Att: George W. Clark, Business Representative, 732 F. Street, San Diego, California.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 3rd day of September, 1952, a petition of the National Labor Relations Board for enforcement of its order en-

tered on March 31, 1952, in a proceeding known upon the records of the said Board as "In the Matter of San Diego Gas and Electric Company and Cosby M. Newsom, an individual, Case No. 21-CA-1029," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 3rd day of September in the year of our Lord one thousand, nine hundred and fifty-two.

[Seal]: /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

[Endorsed]: Filed September 16, 1952. Paul P. O'Brien, Clerk.

No. 13525

In the United States Court of Appeal for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAN DIEGO GAS AND ELECTRIC COMPANY, RESPONDE

ON PETITION FOR ENFORCEMENT OF AN ORDER OF TH NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
FANNIE M. BOYLS,
THOMAS R. HALEY,
Attorneys,
National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases:

236513—53——1

Statutes: Page

In the United States Court of Appeals for the Ninth Circuit

No. 13525

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAN DIEGO GAS AND ELECTRIC COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on a petition of the National Labor Relations Board for enforcement of its order issued against respondent on March 31, 1952, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, Section 151, *et seq.*), herein called the Act.[1] The Board's Decision and Order (R. 92–97) are reported at 98 NLRB No. 146. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor prac-

[1] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 22–23.

tices in question having occurred at San Diego, California, within this judicial circuit.[2]

STATEMENT OF THE CASE

I

The Board's findings of fact and conclusions of law [3]

Following the usual proceedings under the Act, the Board found that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act, and that respondent discriminatorily discharged Cosby M. Newsom in violation of Section 8 (a) (3) of the Act. The subsidiary facts upon which these findings rest may be summarized as follows:

A. The technicians' organizational activities; respondent's warning of reprisals

At all times material to this case, respondent employed five instrument technicians in its electrical production department: Thomas Fowler, Roy Shroble, Ollie Webb, Tony Botwinis, and Cosby Newsom. In the fall of 1950, employee Newsom returned to work after a visit to Los Angeles and informed his fellow technicians at respondent's San Diego plant

[2] Respondent is a California public utility corporation engaged in supplying illuminating gas and electricity for industrial, commercial, and domestic use to the residents of the city and county of San Diego, California. No jurisdictional issue is presented since respondent admits that it is engaged in commerce within the meaning of the Act (R. 5).

[3] The Board adopted the findings, conclusions, and recommendations of the Trial Examiner with but slight modification, noted in its decision (R. 93–94). In the following statement references preceding the semicolon are to the Board's findings. Those following the semicolon are to the supporting evidence.

that persons doing similar work in Los Angeles received a higher rate of pay. Someone pointed out that the workers in Los Angeles belonged to a union, while those in San Diego did not (R. 12; 104–105).

For reasons not here material, the question of the instrument technicians' joining a union lay dormant until just prior to January 15, 1951. On that day employee Newsom, in the presence of employees Fowler and Shroble, told Harold L. Warden, respondent's instrument engineer and the technicians' immediate supervisor, that they planned to ask the International Brotherhood of Electrical Workers, Local No. 465, herein referred to as the Union, to represent the instrument technicians in seeking higher wages (R. 12; 106–107). Warden sympathized with them and offered to assist their organizational efforts (R. 12; 107, 161, 182, 203).

Warden then told Joseph L. Kalins, efficiency engineer and Warden's immediate superior, that the instrument technicians intended to join the Union. Together Kalins and Warden went to the office of Charles R. Hathaway, superintendent of respondent's electrical department and their immediate superior, and told him of the instrument technicians' intentions. Hathaway at once requested that the instrument technicians be brought to his office (R. 13; 203, 363).

Before the technicians appeared in answer to this request, Hathaway consulted Noble, respondent's general superintendent, and was told by Noble that "the Company might have certain reservations concerning the instrument men becoming members of the Union" (R. 28; 377–378).

Meanwhile, Warden notified all five instrument technicians of the meeting with Hathaway, and on the afternoon of January 15, the technicians, Warden and Kalins, met in Hathaway's office (R. 13; 109–110, 161, 173, 182). Hathaway opened the meeting by inquiring who was the employees' spokesman. There was no official spokesman, but Newsom was the first employee to speak and did most of the talking for the employees (R. 13; 110, 162, 179, 204–205). Hathaway was told, in answer to his inquiries, that there was no grievance other than the wage question and that the instrument technicians thought they could not obtain a raise through normal Company channels (R. 13–14; 364). Hathaway stated that he thought their chance of obtaining a raise would be better through Company channels because the Union might not be able to act for a long time (R. 14; 364). He also said that the Company might have objections to their joining the Union because of the nature of their jobs. It was pointed out in this regard that some of the technician's work was "confidential" (R. 14; 111). And, finally, Hathaway suggested that the technicians "think this matter over very carefully" because by union membership the men might lose certain advantages and privileges they then had (R. 14; 110, 173, 183, 365). As the meeting closed, the technicians stated that they would discuss the matter and come to a decision (R. 14; 365).

Immediately after the meeting, all five instrument technicians decided to join the Union. Accordingly, Newsom drafted an appropriate petition, which was signed by each technician and certified by a notary

public (R. 14–15; 111–113). Copies were sent to Respondent's vice president, E. D. Sherwin, and to the Union (R. 15; 113–114).

The following morning, January 16, Newsom, Fowler, and Shroble told Warden as they reported for work that they had petitioned for union representation. Warden, in contrast to his sympathetic attitude of the day before, now seemed pessimistic. He said, in effect, that things did not look "too good" (R. 15; 114) for the technicians, that there would be strong opposition to their efforts to organize, and that they should get their affairs in order because they might have to look for new work (R. 15; 114–115, 163, 168, 184). Warden also suggested that with their qualifications they might find it difficult to compete for jobs in the market (R. 16; 148). The technicians told Warden that they would look for other jobs if necessary, but would first complete their organizational drive (R. 16; 115, 184).

The Board, adopting the Trial Examiner's findings as to credibility,[4] concluded that by these threatening statements respondent interfered with, restrained, and coerced its employees and thus violated Section 8 (a) (1) of the Act.

B. Respondent discharges Newsom because of his union activities

Soon after learning of the technicians' decision to organize, Superintendent Hathaway discussed the matter with General Superintendent Noble and asked Noble's permission to terminate the employment of

[4] The Trial Examiner discredited Warden's testimony that he only advised the technicians to prepare a "case" substantiating their demands for a wage increase (R. 17).

Newsom, who, he stated, was unsatisfactory. Noble instructed him that regardless of the organizational activities, Hathaway should discharge Newsom if he was unsatisfactory and that he would leave it to the judgment of "the department" as to whether Newsom was satisfactory (R. 28; 371, 378).

On January 30, 1951, 2 weeks after respondent learned of the technicians' union activity, Hathaway held a periodic departmental meeting with the chiefs of respondent's B and Silver Gate stations, Kenneth Campbell and Walter S. Zitlaw (R. 18; 210–211). By special arrangement, Kalins and Warden also attended and outlined a projected training program for the instrument technicians, which was discussed and adopted. At the conclusion of this, according to the testimony of Hathaway and respondent's other representatives, Hathaway asked how the men were performing their work, and Warden replied that all were satisfactory except Newsom (R. 18–19; 210, 211, 332, 366, 386, 402). The discussion then centered on Newsom and each man was asked to state his opinion of Newsom's work. All agreed that Newsom was an unsatisfactory employee and it was concluded that he should not be in the training course. Finally, Hathaway put the question "Should we terminate Newsom?" and each man answered in the affirmative. Hathaway then instructed Kalins to give Newsom 2 weeks' notice (R. 19; 211, 333, 367, 387, 403).

The next day Warden brought Newsom to Kalins' office. Kalins told Newsom of the decision to terminate his employment on February 15, stating in the alternative that Newsom could apply for a transfer or

resign (R. 19; 116, 213–214, 333, 338). Kalins recited the following reasons from notes he had taken at the supervisor's meeting (R. 335):

> * * * (1), does not have ability to get along with supervisors; (2), no desire to set a pace for the other men or show leadership, does not produce in accordance with ability; (3), producing measured output to just barely get by; (4), unsatisfactory workmanship, sloppiness of work, uncompleted jobs, no dependability; (5) does not fit into department setup.

Upon Newsom's request for a more specific statement of the charges against him, Kalins enumerated certain incidents, described in more detail *infra,* pp. 16–18, none of which was of recent occurrence. These were discussed, and Newsom protested that the incidents were only minor ones which were of lesser importance than many mistakes other technicians had made (R. 19; 117, 335). He said that because of the move to organize the department, his discharge had a bearing on the other technicians, and he requested a meeting at which all the technicians would be notified of his discharge and the reasons therefor (R. 20; 117). Later that day, technicians Fowler, Shroble, Botwinis, and Webb met with Newsom, Kalins, and Warden at station B, and Kalins restated the reasons for Newsom's discharge. According to the testimony of all those present except Botwinis,[5] the reasons were as follows: (1) Hardway, when he was respondent's efficiency engineer, once complained to Newsom about

[5] Technician Botwinis was in military service at the time of the hearing and did not testify (R. 189).

an omission in a daily log; (2) Warden once received a complaint that Newsom had neglected to adjust gauges at Silver Gate station at the request of the assistant station chief; (3) Newsom had installed gauges on a turbine, leaving crayon marks on the dial faces; and (4) in December 1950, Newsom had failed to discover an inoperative mechanism during a routine check (R. 20; 119–126, 165, 174, 185).

In the presence of the other technicians Newsom gave an explanation of each incident as it was mentioned (R. 20; 119–126). When Kalins invited the technicians to express their views concerning Newsom's discharge, Fowler said that "the men were all together in this thing" and he felt the Company might be firing Newsom in order to break up their organizational efforts (R. 20; 124, 217, 336–337).

Several days later, Warden admonished Newsom not to talk to any employee during working hours about the disciplinary action being taken against him and told him that if he did so, he would be discharged forthwith (R. 27; 127–128). And a few days before February 15, Kalins attempted to persuade Newsom to resign, stating that this "would make things easier" and, besides, Newsom might then be entitled to collect his vacation pay (R. 27; 128). During this period also, Kalins declined to promote technician Webb to a higher classification because "the union activity had changed the picture and they didn't know what would happen until things were settled" (R. 27; 180–181).

At the expiration of the 2-week notice period, Newsom refused either to resign or to request a transfer,

and on February 15, respondent discharged him (R. 20–21; 115).

Newsom had been in respondent's employ almost 3 years prior to his discharge (R. 11; 101). He first served 8 months as a helper in the maintenance department and then was promoted in October 1948 to the position of instrument technician, grade B (*ibid.*). He was the oldest in point of seniority of the five technicians in his department (R. 11; 102, 159, 172, 182).

Despite the alleged deficiencies in Newsom's work existing throughout his tenure as a technician but mostly during the early part of his tenure (see more detailed discussion, *infra,* pp. 16–20), John T. Hardway, respondent's efficiency engineer until the end of August 1950 when he re-entered the United States Navy, testified that on the date he left there was not sufficient reason to discharge Newsom (R. 298). Moreover, when Hardway returned to visit the plant in December 1950, he told Newsom: "It looks like this war may involve us too, and if you and the rest of us return, remember this, Newt, there is a place for you in the instrument department. I don't care whether you go back in the Merchant Marine, the Navy, or what, but there is a place for you in the instrument department" (R. 26–27; 132).

Station Chief Campbell, similarly in effect acknowledged the satisfactory character of Newsom's services when he told Newsom about a week before the effective date of Newsom's discharge that he should not be "broken hearted" over his plight, adding that he,

Campbell, had recommended Newsom very highly a year or so before and was sure that Newsom would make his mark in the world, for Newsom was strong, versatile and able (R. 27; 129). Respondent's respect for Newsom's ability as a technician was likewise displayed around the first of 1951,[6] before it learned of Newsom's leadership in the union movement. Upon that occasion Warden assigned Newsom to certain "routine" work, explaining that he disliked burdening Newsom with that type of work but Newsom was the only man in the department capable of doing that work satisfactorily (R. 27; 108).

Under all the circumstances, the Board concluded that "even assuming shortcomings in Newsom's work, it was not the shortcomings but his Union activities which led to his discharge" (R. 26, 94). It accordingly found that respondent had discriminated against Newsom in violation of Section 8 (a) (3) and (1) of the Act (R. 94).

II

The Board's order

The Board ordered respondent to cease and desist from the unfair labor practices found; to reinstate Newsom to his former position with back pay, to make available to the Board upon request all records necessary to compute the back pay due; and to post appropriate notices of compliance (R. 95–97).

---

[6] The Trial Examiner inadvertently referred to this date as 1950 (R. 27; 108, 167, 201).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that respondent violated Section 8 (a) (1) of the Act by threatening to discharge the instrument technicians if they continued their union activities.

2. Whether substantial evidence supports the Board's finding that respondent violated Section 8 (a) (3) and (1) of the Act by discharging Cosby M. Newsom because of his union activity.

ARGUMENT

I

Substantial evidence supports the Board's finding that respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act

It is rudimentary that an employer who threatens his employees with discharge if they continue their union activities thereby violates Section 8 (a) (1). Moreover, there can be little question, on this record, that substantial evidence supports the Board's finding that Warden on January 16, threatened the technicians with discharge in retaliation for their organizational efforts.

It is undisputed that Warden met Newsom, Fowler, and Shroble as they arrived at work that day, *supra,* p. 5. Warden then learned for the first time that the technicians had petitioned for union representation (R. 207). His attitude, formerly one of sympathy, changed to pessimism. And, apparently motivated by the news he had just heard, he told the technicians that they should get their personal affairs in order

because they might have to look for new jobs, *supra*, p. 5. Despite Warden's denials that he meant to threaten the employees with loss of jobs because of their union activity, the record shows clearly that his words were interpreted by the men as such a threat. All three technicians present testified that he said they might lose their jobs, and that his warning made them think about the possible consequences of their action (R. 115, 169, 187). Cf. *N. L. R. B.* v. *W. T. Grant Co.*, 199 F. 2d 711, 712 (C. A. 9).

To the same effect is the testimony concerning Warden's statement that the technicians were perhaps not qualified to compete for jobs in the market, *supra*, p. 5. Here, too, Warden clearly meant that the technicians might be forced to look for other jobs.

The testimony concerning this incident thus makes it clear that respondent, through Warden, threatened the technicians with discharge if they continued to organize, and that the Board's findings in this respect are supported by substantial evidence.[7] There was a

[7] Respondent contends that even if Warden made the statements attributed to him, he did not represent respondent in that instance and it cannot be responsible therefor (R. 49). Here respondent is plainly in error. It is unquestioned that Warden, as respondent's instrument engineer, is the immediate supervisor of the instrument technicians and as such assigns and oversees the technicians' work (R. 122, 191, 243). Obviously, as to them, he is an integral element of respondent's chain of command. The fact that Warden is not at or near the top of respondent's management hierarchy is immaterial so long as the employees reasonably consider him a representative of management. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80. Moreover, the record shows that throughout this case Warden acted as a member of management. Such conduct alone makes his acts those of the employer,

conflict in the testimony concerning Warden's statements to the technicians, but the Board properly adopted the credibility findings of the Trial Examiner, whose decision on such questions should be accepted "for obvious reasons." *N. L. R. B.* v. *State Center Warehouse & Cold Storage Co.,* 193 F. 2d 156, 157 (C. A. 9); see also *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, 496.

II

Substantial evidence supports the Board's finding that respondent discharged Cosby M. Newsom for his union activities in violation of Section 8 (a) (3) and (1) of the Act

A. The basis for the Board's conclusion that Newsom was discriminatorily discharged

The evidence summarized above, pp. 5–10, shows that employee Newsom, despite almost 3 years' service, was discharged by respondent 2 weeks after the technicians' union activity, in which he was a leader, began. Respondent contends, however, that Newsom was discharged for unsatisfactory work; and it asserted at the time of the discharge and at the hearing evidence of several stale incidents which, it urges, are examples of Newsom's "incomplete," "inaccurate," "sloppy," and "spasmodic" work (R. 193, 214, 227, 230–231, 240, 385). After considering these incidents the Board properly concluded, as we shall show, *infra,* pp. 14–21, that they did not furnish persuasive support for respondent's contention that Newsom's work was unsatisfactory (R. 93–94).

---

as this Court declared in *N. L. R. B.* v. *Security Warehouse and Cold Storage Co.*, 136 F. 2d 829, 833; and *N. L. R. B.* v. *Pacific Gas & Electric Co.*, 118 F. 2d 780, 787.

The recitation of respondent's criticisms of Newsom, *infra,* pp. 16–20, shows that the incidents assigned as "causes" for his discharge run back 2 full years. Newsom was retained in respondent's employ for nearly 3 years, during practically all of which time he served as an instrument technician. Despite these incidents, Newsom had become respondent's senior technician before his discharge.

It is significant that none of these incidents occurred near the date of Newsom's discharge except, perhaps, alleged errors or omissions in the preparation of some records, which were not discovered by Warden until after Newsom's discharge (see *infra,* p. 18) and which consequently could have played no part in the decision to discharge Newsom. In January 1951, moreover, despite his alleged deficiencies, Newsom was told by Warden that he was the only man who could handle routine work at both stations, and was selected to instruct Webb in routine at Silver Gate station (R. 108, 167, 201).

Witness Hardway, who was formerly respondent's efficiency engineer and who criticized Newsom's work, *infra,* p. 17, testified that in August 1950, when he left respondent's employ to enter the armed services, there was not sufficient reason to discharge Newsom (R. 298). And he assured Newsom as late as December 1950 that there would always be a place for him in the instrument department (*supra,* p. 9).

These statements and respondent's actions are inconsistent with its strenuous assertions that the incidents cited by it as the reasons for the discharge were taken seriously by it when they occurred, or that New-

som's discharge was contemplated as early as September 1950, as respondent contended at the hearing (R. 197). Obviously, in the face of such inconsistencies, the Board properly concluded that respondent's conduct prior to the disclosure of Newsom's union activity is the better evidence of Newsom's performance.

Respondent's contention that Hathaway decided to discharge Newsom only after hearing the supervisors' unfavorable reports at the January 30 meeting ignores Hathaway's testimony that before that date he asked Noble's permission to dismiss Newsom (R. 370–371).[8] This discussion between Hathaway and Noble occurred subsequent to January 15, when respondent first learned of Newsom's union activity. These facts, taken in conjunction with Noble's statement that the Company might have objections to the technicians' joining a union, *supra,* p. 4, and Warden's threats that they might have to look for new jobs, furnish an adequate basis for the Board to infer that Hathaway's decision to discharge Newsom was motivated by Newsom's union activity. *N. L. R. B.* v. *Robbins Tire & Rubber Co., Inc.,* 161 F. 2d 798, 801 (C. A. 5).

The record is devoid of any incident occurring near January 30 to prompt Newsom's dismissal, except his union activity. In these circumstances and in the absence of any persuasive explanation, the adverse inferences to be drawn are plain. Here, as in other cases, the Board may properly conclude that "There is real significance in the time that [respondent]

[8] On the basis of this testimony, the Trial Examiner and the Board found that Hathaway decided prior to January 30 to discharge Newsom (R. 28–29).

elected to revive an ancient (and apparently forgotten) complaint, and make it serve as the proffered excuse or reason for [Newsom's] discharge." *Peoples Motor Express Co.* v. *N. L. R. B.,* 165 F. 2d 903, 906 (C. A. 4).

Even if some of the faults respondent finds with Newsom's work are valid, they do not furnish persuasive support for respondent's defense. "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N. L. R. B.* v. *Wells, Inc.,* 162 F. 2d 457, 460 (C. A. 9). Here, the inconsistencies of the employer's conduct, the minor character of Newsom's errors, and respondent's long toleration of his faults, support the Board's view that "in the light of his long service with [respondent], it was reasonable to conclude that the difficulties inherent in [Newsom's] case only became seriously insupportable to his employer when he became [interested in] the Union, and that his discharge * * * was directed more at his unionism than at his peculiarities." *Agwilines, Inc.,* v. *N. L. R. B.,* 87 F. 2d 146, 154 (C. A. 5). As we show below, a close examination of the nature of the incidents allegedly motivating Newsom's discharge emphasizes the correctness of this conclusion.

B. The incidents relied upon by respondent

In support of its criticisms of Newsom's work as "inaccurate," "sloppy," and "spasmodic," respondent cites evidence that early in 1949 Newsom spent a lot of time in his office at Silver Gate station rather than at the "scene of the work" (R. 397); that in October

1949, Newsom was absent from work for three days without giving advance notice to the Company (R. 222);[9] that early in 1950, Newsom neglected to calibrate a gauge at the request of an assistant station chief, Mr. Prout (R. 121);[10] that Hathaway received complaints of horseplay by Newsom early in 1950 (R. 360); that operators at Station B complained to Campbell early in 1950 that control equipment was not being efficiently maintained (R. 383);[11] that about June 1950, Hardway and Warden verbally chastised Newsom for having omissions in his daily log reports (R. 119, 291);[12] that later in 1950 Newsom left crayon marks on the face of certain gauges he installed (R. 123, 137);[13] that during a routine check in December 1950, Newsom failed to discover an inoperative air-flow draft mechanism which, although it could not have caused any damage, would have prevented the

[9] Newsom testified that he was sick on this occasion and that he did not give notice because no telephone was available (R. 424). Warden made no complaint at the time (*ibid.*).

[10] Newsom testified that he in fact adjusted three of four gauges pursuant to Prout's request by "sandwiching" them in between other work, and that he explained this to Warden's satisfaction at the time (R. 122).

[11] Despite Campbell's testimony criticizing Newsom's work, the record shows that during a conference with Newsom shortly after the discharge Campbell said that Newsom would "make his mark" in the world since he was "strong, versatile and able" (R. 129).

[12] Other technicians also testified, as the Board noted, that their logs were often incomplete (R. 27; 167, 176, 186). As Fowler said, log omissions were not generally considered serious (R. 186).

[13] Both Newsom and Shroble testified that this work was done on Saturday when Warden had directed that overtime be minimized, and also that since the equipment was to be painted before its operation another cleaning would be required (R. 123–124, 166).

successful operation of the boiler (R. 126, 252–253).[14]

In its attempt to show that Newsom was inefficient, respondent was unwilling to rely upon the evidence before it at the time it discharged Newsom; it produced, in addition, evidence which it did not discover until after Newsom was discharged (R. 441–454). This evidence consisted of several test reports prepared by Newsom on standard forms.[15] Warden described in detail the errors which appear in those records (R. 223–240, 277–283). The Trial Examiner concluded that these errors could not have motivated Newsom's discharge in view of Warden's admission that they were not discovered until February 1951, after Newsom was dismissed (R. 22; 227–228, 232, 234). The Board, however, considered the records and all the relevant testimony and found that the errors would not mislead the skilled persons who used the records. Accordingly, it concluded that the records were not persuasive evidence that Newsom was an unsatisfactory employee (R. 93–94).

An examination of the records demonstrates the reasonableness of the Board's conclusion (R. 223–240, 277–283, 409–422). Respondent complains that on pages 5 and 6 of the records Newsom did not make duplicative entries of certain lever settings which,

[14] In marked contrast to this harmless mistake is Fowler's testimony that he once left all the fuses out of a set of meters, an error which was serious because it was then impossible to ascertain whether the boilers were operating properly (R. 186).

[15] The instrument technicians prepare such reports as a part of their routine work to show the results of various electrical, mechanical, and chemical tests and to record operating data. Their duties are summarized in Respondent's Exhibit 1 (R. 141).

once adjusted, remain static (R. 412, 433–434, 444–445). This was common practice (R. 435), and was not misleading. On page 6 certain figures on excess airflow are not within the normal standards of operation, but these figures only reflect faulty operation of the equipment at the time the test was made and do not indicate that Newsom erred in recording the figures (R. 413, 445). Pages 7, 8, and 9 show that Newsom did not physically correct certain erroneous titles on the printed forms, but this seems unimportant since those who used the reports knew the proper titles (R. 415, 436, 446–448). These pages, which reflect only a part of the tests (R. 414), also show certain omissions which should have been entered by another technician and a column of figures entered slightly out of line, which does not impair the value of the report (R. 415, 418–419, 447).

Page 10 shows a flow chart which respondent asserts Newsom read inaccurately (R. 234–235, 449). The different results reached by Warden and Newsom, however, merely reflect different methods of reading the chart; Newsom recorded his reading of the chart as the pen progressed, while Warden took the average of all the readings during the test period (R. 235, 417). Page 12 refers to an incident in which Newsom is said to have signed Webb's name to a report without authority (R. 220, 451). Newsom pointed out that the handwriting in the column does not appear to be his (R. 420–421), and in any event it seems improbable that this matter could be regarded as serious. Pages 13, 14 and 15, in comparison with

page 1, show merely that certain duplicative entries were omitted (R. 238–241).

Respondent's reliance on this exhibit to support its contention that Newsom was discharged for his poor work overlooks a significant part of Warden's testimony. Warden admitted that in compiling the exhibit he examined all of the numerous reports Newsom periodically made but included only those which showed errors (R. 283). Obviously the few records contained in this exhibit represent only a small part of the work Newsom produced during the 2 years he served as a technician. In the light of this testimony, the exhibit tends to rebut, rather than to strengthen, respondent's contention that Newsom's work was unsatisfactory over a long period.

On these grounds, as well as the unimportance of the alleged errors in the exhibit, we think the Board was entirely correct in concluding that the exhibit was not persuasive evidence of unsatisfactory work by Newsom (R. 94).

In summary, respondent's entire effort to show that it was motivated by the unsatisfactory nature of Newsom's work rather than by his union activities in discharging him, is, as the Board found, something less than persuasive. Especially is this so where, as here, respondent belatedly submits for the first time at the hearing evidence of the dischargee's errors which it discovered only by diligent search *after* the discharge. Such acts by the employer seem "an obvious effort to construct a case against [Newsom] and to cover up the real reason for his discharge." *N. L. R. B.* v. *Arcade Sunshine Co., Inc.,* 118 F. 2d 49, 51 (C. A. D. C.), certiorari denied, 313 U. S. 567. Moreover,

considered upon the entire record, the evidence amply warrants the Board's conclusion that Newsom's discharge was motivated by his union activities. It is true that the evidence is conflicting, but "the inferences reasonably to be drawn from this conflicting evidence were for the Board to determine." *Coca-Cola Bottling Co.* v. *N. L. R. B.,* 195 F. 2d 955, 957 (C. A. 8); see also, *N. L. R. B.* v. *State Center Warehouse and Cold Storage Co.,* 193 F. 2d 156, 158 (C. A. 9).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper,[16] and that a decree should issue enforcing the order in full.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
FANNIE M. BOYLS,
THOMAS R. HALEY,
Attorneys,
National Labor Relations Board.

JANUARY 1953.

[16] Respondent contends in its answer to the Board's petition that Section 10 (c) of the Act, which precludes the Board from ordering the reinstatement of any employee discharged for cause, is applicable here (R. 462). But, as we have shown, the Board found on the basis of substantial evidence that Newsom was discharged for his union activities and not for cause. Cf. *N. L. R. B.* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C. A. 4).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Supp. V, Sec. 151 *et seq.*, are as follows.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will

effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

SEC. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1953

No. 13525

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAN DIEGO GAS AND ELECTRIC COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE SAN DIEGO GAS AND ELECTRIC COMPANY

LUCE, FORWARD, KUNZEL & SCRIPPS
Attorneys,
SAN DIEGO GAS & ELECTRIC COMPANY

TOPICAL INDEX

AUTHORITIES CITED

Cases:

Statutes:

In the United States Court of Appeals for the Ninth Circuit

No. 13525

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAN DIEGO GAS AND ELECTRIC COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF RESPONDENT

INTRODUCTION

The National Labor Relations Board has petitioned this Court for the enforcement of its order issued against Respondent on March 31, 1952, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V. Section 151, et seq.), herein called the Act. The Board's decision and Order (R. 92-97) are reported at 98 NLRB No. 146.

The Petitioner has heretofore filed its brief and the Respondent presents this brief in reply thereto.

In references hereafter to the Transcript of Record the said Transcript will be designated "R."

The general question involved is whether or not the respondent discriminated against an employee by his discharge allegedly for union activity.

I.

STATEMENT OF THE CASE

The statement of the case presented by Petitioner in its brief is not complete and in many instances is not a fair statement of the facts. It is therefore necessary for the Respondent to present a statement of the case and of the facts and of the evidence which will more completely and more fairly state the case.

1. Undisputed Facts.

There is no conflict in the evidence except in one particular which will be hereinafter referred to. Therefore the following statements of facts are undisputed.

The Respondent San Diego Gas and Electric Company is a public utility supplying light, power and heat to the City of San Diego by the distribution of electricity and gas to the City and County and steam to the downtown section. It has two main plants which are frequently referred to in the evidence: Station B, at the Foot of Broadway in the City of San Diego, and Silver Gate Station at the southeast end of town, at the foot of Sampson Street (R. 190). The Silver Gate Station is rated at 160,000 kilowatts and Station B, at 100,000 kilowatts (R. 284). At Silver Gate there are three generating units and at Station B at least two units (R. 193).

A large portion of the employees of this utility are members of a union (R. 372, 387), and the principal bargaining union is International Brotherhood of Electrical Workers, Local Union 465 (R. 9).

The employee for whom the proceedings were brought is Cosby M. Newsom. He started work for the Company in February, 1948, in the Electrical Production Department. Then in turn, he became instrument technician, grade B, and was holding that position at the times referred to here (R. 101). He was one of about five instrument technicians whose duty it was to overhaul and to keep in order and to test the instruments in Station B and Silver Gate (R. 191). At the times in question here, none of these men were members of a union as indicated by the evidence.

In the Fall of 1950 Mr. Newsom and the other technicians discussed the matter of joining the union in order to secure an increase in wages (R. 104). On January 15, 1951 these employees, Cosby M. Newsom, Ollie E. Webb, Thomas R. Fowler, A. P. Botwinis, and Roy A. Shroble, signed a certificate assigning Local 465 of International Brotherhood of Electrical Workers as their collective bargaining agent for the purpose of negotiating a wage scale agreement with the Company (R. 112). Mr. Newsom then called the attention of Mr. Warden, Instrument Engineer, and his immediate superior, to this certificate, and Warden told them that he would assist them in any manner that he could, but that because of his position as Instrument Engineer he could not guarantee them any specific things without the consent of proper persons above him (R.

202). Warden contacted other signers and made the same statement to them (R. 203). He reported to his superior and then went to the office of Hathaway, the Superintendent of Electrical Production of the Company.

Mr. Hathaway stated that if the men desired a meeting with him he would be happy to arrange such a meeting with them (R. 203). Warden and Kalins, his superior, stated to Webb and Botwinis that Hathaway had offered but not requested a meeting and that if the men desired a meeting he would very much like to talk with them, but that it was Mr. Hathaway's instructions that he was not to make it a form of request from Hathaway (R. 203). Fowler and Newsom stated that they did not see how it could do any good but it could no no harm. (R. 203).

On that same day the men involved, to wit: Newsom, Shroble, Fowler and Botwinis, met with Mr. Hathaway in his office, and Warden and Kalins. Mr. Hathaway first asked the question: "Who is the spokesman for your group?" He was answered that no one had been appointed officially as spokesman (R. 204).

At this meeting Hathaway asked what it was all about, and Newsom replied that they were there to listen and not to talk. It was explained that the only items involved were wages. Hathaway wanted to know why they had not come to him first, and the men told him it would not have done any good. Hathaway explained the good relations with the union at the present

time and that it made no difference whether the men worked as a union group or not. He suggested that they consider the advantages of joining the union and of not joining the union, and the advantages and privileges which they now had as not being members of the union. He also told them to consider the matter well and that they should have established in their minds their desires and wants (R. 205). It was stated by the men that no official action had as yet been taken as far as asking the union to be their representative (R. 206). Mr. Warden at this meeting reiterated his statement that he would assist them in any manner that he could; and Hathaway also stated he would work with the men in any way he could through Warden, such as supplying them with information that might be necessary for them to prepare a complete demand for more money (R. 206).

The meeting was concluded with the statement from those men that they would consider and let their superiors know at a later date their official desires (R. 206). After the meeting with Hathaway, Warden and the men went down to the instrument shop at Station B where a general conversation was had in respect to whether or not the men could receive an increase in salary.

The next morning, January 16, 1951, a conversation was had between some of the men, including Newsom and Warden. The men informed Warden that they had decided to go ahead with their efforts to join the union, and then a further conversation ensued with

Warden. What this conversation was is the only point upon which there is a conflict in the evidence. Newsom testified that Warden said that the position of the men did not look too good and that if he were in their shoes he would "get these affairs in order" because there was a possibility that they would all be looking for other work. Newsom further testified that Warden asked if the men considered themselves able to compete in the field as instrument technicians and that he, Warden, didn't believe they could and that the men were going to encounter some strong opposition in their move to organize (R. 114). Warden denies that he made this statement or anything similar. Fowler gives an entirely different version of the conversation, and Shroble and Webb give rather evasive corroboration to Newsom. This conversation is one of the very important issues in the case and will be elaborated on hereafter in this brief.

Joseph L. Kalins, the Efficiency Engineer for the Company (R. 323), had been preparing a training program, and on January 30th, 1951, attended a meeting in the office of Mr. Hathaway to consider this training program. This was also a weekly departmental meeting which was usually attended by the station chiefs and Mr. Hathaway, Superintendent of Production. In this particular case Warden and Kalins were also present. They presented a program for the training of instrument men and explained the need for this training. It was then discussed in open meeting from various angles as to the time to be allotted to the meetings, who should be instructors and the type of in-

struction that should be given. It was finally decided that the presentation as given by Kalins was correct and that they would proceed accordingly and have two meetings a week, one hour on Company time and one hour overtime (R. 366). There were present at the meeting, Mr. Hathaway, Superintendent of Electric Production, Walter S. Zitlaw, Station Chief at Silver Gate, Kenneth Campbell, Station Chief at Station B, Kalins, Efficiency Engineer, and Warden, Instrument Engineer (R. 211).

Newsom's name was mentioned after Mr. Hathaway's question came up as to how the men were doing in the department. One of them replied that all were doing fine except Newsom (R. 211). Then Hathaway asked each man in the group about Newsom, as to whether or not his work was satisfactory following the occurrences in the past (R. 366). Each person present explained his opinion that Newson was not a satisfactory man, and that the Company should not waste time or the time of other men or the training instructors in the course; that he could not be left out of the course as an instrument man and that he should be offered the opportunity of a transfer and if he didn't choose to be, then terminated (R. 367). Each man was asked the question: Should we terminate Newsom? Hathaway asked each individually and the answer from each, given individually, was that he should be terminated or offered transfer (R. 367 and R. 211). Thereupon Hathaway instructed Kalins to give Mr. Newsom notice to that effect.

Further evidence of the unsatisfactory nature of the work of Newsom prior to January 1, 1951, was testified to by seven superiors of Newsom at the hearing, and this testimony will be later quoted.

On January 31st, Mr. Kalins called Mr. Newsom to his office and read to Mr. Newsom certain notes which he had written down on the papers as the reasons for his discharge. After Newsom demanded a further hearing before the other instrument technicians, they were summoned to Kalins' office and the matter further discussed. Kalins then told Newsom that he could transfer to some other department by making appropriate application with the Personnel Department but that his termination in that Department would be effective February 14 (R. 338). Newsom did not answer directly but said he would give his answer the following day; and did not again communicate with Kalins until the last day, and on February 14 Kalins bid him goodbye (R. 338).

At the hearing before the Examiner, Harold L. Warden, the immediate superior of Newsom, and Instrument Engineer, testified to the many reasons extending over a period of time from October 1949 why the work of Newsom was unsatisfactory, and that he had been warned (R. 193-201). Records of the Company, showing sloppy work and carelessnesss in his work on the instrument records was also presented by one of them. John T. Hardway, former Efficiency Engineer for the Company and at the time of the hearing a Lieutenant Commander in the United States

Navy, also testified as to the inefficient work performed by Newsom, beginning in June, 1950, and also as to his criticizing Newsom directly after hearing complaints from Warden (R. 292-298). B. L. Stovall, formerly Efficiency Engineer of the Company and at the time a Lieutenant Commander in the United States Navy, stationed at San Diego, stated that he had complaints from the Operating Department to the effect that Newsom was doing inefficient work, and himself observed that Newsom was given to horseplay, wasting time in conversation, lack of initiative (R. 313-317). Joseph L. Kalins, Efficiency Engineer at the time of the termination of Newsom's employment testified that he first questioned Newsom's ability in May or June of 1950 and discussed the matter with Newsom thereafter. Later he had several complaints from Warden and went over the same with Newsom (R. 325-331). He gave Newsom at the time of his termination, grounds of complaint in substance as follows:

(1.) That he does not have ability to get along with his supervisors;

(2.) That he had no desire to become a lead to set the pace for other men or show leadership, does not produce in accordance with ability;

(3.) He was producing a measured output to just barely get by;

(4.) That his workmanship was unsatisfactory and sloppy and jobs were uncompleted and he had no dependability;

(5.) He did not fit into the department set-up.

These reasons were discussed in detail, enlarged and some examples given (R. 335).

Charles R. Hathaway, Superintendent of Electrical Production, testified that he heard numerous complaints about Newsom from early in 1950 and from various supervisors.

Kenneth Campbell, Station Chief at Station B, testified that he received repeated complaints prior to May, 1950 as to the work of Newsom and that it continued to be unsatisfactory. After May, 1950 it was still unsatisfactory and spasmodic and that it was for the best interests of the Company to terminate him.

Walter S. Zitlaw stated that he was Station Chief of Silver Gate; that he had heard numerous complaints about Newsom and noted that his work had become lax. The general opinion after observation of Newsom was that he was unsatisfactory and inefficient and should be terminated. (R. 397-400).

Every one of these witnesses testified emphatically that the union activity of Newsom had no part and was given no consideration in arriving at the conclusion to terminate him.

2. The Pleadings.

After taking statements from Newsom and his associates, the Petitioner filed a complaint in which it charged the Respondent with the following:

A. Advising its employees that the union and concerted activities placed their business in jeopardy;

B. Advising its employees that they could receive no benefits through the union;

C. Threatening employees with loss of privileges should they persist in union and concerted activities;

D. Promising greater benefits to employees and continued privileges as inducements to employees to cease their union activities (R. 2, 3).

Respondent insists that none of these charges was proven.

The Trial Examiner filed his findings and concluded that the Respondent had been guilty of the discrimination charge and recommended that Newsom be reinstated. These findings (R. 8-35) are not in form encountered in the ordinary court proceedings in the State and Federal courts. The findings are not numbered so that they can be easily identifeid and discussed, and the findings of fact and conclusions of law are mixed together, causing confusion to the attorneys. The findings are also closely interwoven with argumentative matter by the Trial Examiner. It will also be observed that the Examiner finds that none of the witnesses of the Respondent are worthy of belief but that Newsom was a convincing witness. Counsel for Respondent filed a detailed statement of exceptions to the intermediate report and recommended order of the Trial Examiner, and these exceptions are in detail (R. 37-81). Attached to said exceptions is an ap-

pendix giving a summary of the evidence of the witnesses for the respondent (R. 81-92). These detailed exceptions and summary are referred to for the purpose of calling the exceptions to the attention of this Court, but are not repeated here in order to shorten this brief.

The Petitioner rendered its decision upon the objections filed and upheld the decision of the Trial Examiner.

3. Misstatements of Fact in Petitioner's Brief.

Counsel for the Petitioner by downright misstatements of fact in Petitioner's Brief and by picking out short quotations from testimony presents an entirely erroneous statement of the case. This Court should note these statements and discard them at the beginning of its consideration of this case.

An outstanding instance of the false statement of the evidence appears at Page 3 of Petitioner's brief where it is said:

> "Hathaway at once requested that the instrument technicians be brought to his office."

This statement is presented in this manner so as to mislead this Court into believing that Mr. Hathaway ordered or compelled in some manner the instrument technicians to be "brought" to his office. The use of the word "brought" is intentional and would, if unanswered, mislead this Court on one of the important elements of this case. Nowhere in the evidence does it appear that Mr. Hathaway used this term or any-

thing similar. The references to the record do not justify the statement. As appears at Page 203 of the Transcript of Record, the testimony of Warden is as follows:

> "I went to Mr. Hathaway and talked to him about that and Mr. Hathaway said if the men desired a meeting with him, that he would be very happy to arrange such a meeting.
> I came back from Mr. Hathaway's meeting with Kalins and I talked to Mr. Webb and Mr. Botwinis and explained to them what Mr. Hathaway had offered but had not requested. It was an offer of openness on the part of Mr. Hathaway that if the men desired a meeting he would like very much to talk with them, but Mr. Hathaway's instructions to me was not to make that a form of request from him."

No one has testified anywhere that Mr. Hathaway requested that anybody be "brought" to his office. This is quite important.

Another false impression is created by counsel in quoting only a small part of the statement of the witness. It is said at Page 9 of the Brief by counsel:

> "John T. Hardway, respondent's Efficiency Engineer until the end of August 1950 when he reentered the United States Navy, testified that on the date he left there was not sufficient reason to discharge Newsom." (R. 298)

What Hardway really said appears from R. 298 as follows:

"Q. During the period that you were Efficiency Engineer, you had occasion to observe the work of Newsom and the general attitude of his superiors, did you not, towards him and opinion of his work?

A. Yes.

Q. And did you come to a conclusion before you left as to what should be done about Mr. Newsom?

A. Yes, I did, but I got my orders too soon to carry them out.

Q. Did you think up to that time that the character of his work permitted either a termination of his employment or a termination so far as the instrument department is concerned . . .

Q. (By Mr. Luce) In your opinion was the character and quality of Mr. Newsom's work at the time you left sufficient to warrant his dismissal? . . .

THE WITNESS: I won't say it was that bad, but I will say it was unsatisfactory enough that I would have gone into a rather detailed investigation. I would have taken the time myself to have gone into a greater detail, which otherwise was not warranted, and would have come to a final conclusion then whether his removal was justified."

This is an entirely different statement of the evidence than claimed by counsel at Page 9.

Counsel at Page 12 in his brief claims that Warden's statement was "interpreted" by the men as a threat. Certainly the interpretation given remarks

by the men involved is no evidence at all against the Respondent.

On Page 4 of his brief, counsel again uses his own construction of the evidence in an attempt to give an entirely incorrect inference.

Counsel also quoted Hathaway as saying, "that the Company might have objections to their joining the Union because of the nature of their jobs. It was pointed out in this regard that some of the technicians' work was 'confidential.'"

The testimony itself referred to appears at R. 111. This is the testimony of Newsom himself:

> "He (Hathaway) said there are possibly advantages to not belonging to the union that you men are not aware of, that is what he said. He went on to say perhaps we weren't eligible to join the union because some of our work might be classified as confidential.
>
> He said that certain classes of employees, such as supervisors, office personnel and plant guards are not allowed to join the union, and that we might fall into a similar category."

This is an entirely different set of facts than counsel has inferred in his statement on Page 4.

II.

QUESTIONS PRESENTED

The questions presented or points at issue are rather simple and comprise the general question of whether or not the Order is supported by substantial evidence. It may be stated more in detail as follows:

1. That the findings and Order are not supported by substantial evidence in that there is no substantial evidence that the cause of the discharge of Newsom was union activities or that his discharge was even motivated by union activities.

2. That the findings and Order are not supported by substantial evidence even though the conflict in regard to the statement made by Warden is resolved in favor of Newsom.

3. That the Trial Examiner and the Board have drawn erroneous inferences from the evidence.

4. That the support of the findings in the evidence requires a review by this Court of the evidence in the case.

III.

EVIDENCE RELIED UPON BY PETITIONER TO SUPPORT FINDINGS AND ORDER

It is apparent from the brief that the Petitioner relies upon some very unsubstantial evidence to support its Order. The elements relied upon are these:

1. Time of Discharge.

It is conceded that the termination of Newsom occurred two weeks after he had announced that the instrument technicians were about to seek union membership. In answer to that, it appears clearly from the evidence of Warden, Hathaway, Hardway, Campbell, Zitlaw, Stovall, and Kalins that the work of Newsom had been unsatisfactory for some time and that there was sufficient ground to justify his discharge. It also appears in the evidence that the discharge was decided upon on January 30 because that was the beginning of a training program and he was not qualified to take it. The time of the discharge might raise a suspicion but that is all, and numerous cases which will be hereafter cited hold that the evidence is not sufficient to support an order when it is only enough to raise a suspicion.

2. Warden's Statement.

In respect to the statement of Warden the Instrument Engineer, upon which the whole case of the Petitioner really rests, it must be entirely disregarded as a matter of law, even though it be said that there is evidence to support a finding that the statement was made by Warden.

It must be borne in mind that Warden was only an Instrument Engineer and as such would not have authority to bind the Respondent. Cases will be later cited that hold the evidence for the contention of Newsom that Warden made such a statement, is unsubstantial. Newsom testified that Warden said:

> "A. Mr. Warden said that our position didn't look too good, and that if he were in our shoes he would get these affairs in order because there is a possibility we may all be looking for other work.
>
> MR. LUCE: Wait just a second. Let's get that down.
>
> THE WITNESS: He also asked us if we considered ourselves able to compete in the field as instrument technicians. He said he didn't believe we could.
>
> He said we were going to encounter some strong opposition in our move to organize, and I told him that—
>
> TRIAL EXAMINER MYERS: Did he say by whom?
>
> THE WITNESS: No, sir, not to my recollection.
>
> TRIAL EXAMINER MYERS: What did you tell him before I interrupted you? You said 'and I told him—'
>
> THE WITNESS: Well, I told him that as far as looking for another job was concerned, my method would be to complete what we had started, meaning our move to organize; that I would carry that through and then look for another job if my

position there was untenable. That is about the sum of it."

Even if it be assumed for the purpose of this argument that this statement was made, it is exceedingly indefinite as to what was meant, and it certainly is not binding upon the Respondent as will be shown by numerous decisions hereinafter quoted.

However, Warden denied making the statement or anything similar or with similar meaning. (R. 208, 209). Even Fowler, one of the technicians involved and a witness called by the Petitioner, gives an entirely different version of the conversation with Warden. He testified:

"Q. Then he said he hoped you were getting your affairs in shape.

A. Yes.

Q. Then you said you assured him you were prepared to look for other work.

A. Yes.

Q. He didn't say to you that you better be prepared to look for other work.

A. No, sir." (R. 187)

With the help of the trial examiner the witness construed the conversation to mean that he might lose his job over the union activity. However, further examination of the evidence (R. 186-188) indicates that Warden, according to Fowler, did not make the statement charged to him by Petitioner. The interpretation given it by the witness certainly is not evidence

supporting the Order. The other witnesses, Webb and Shroble, were rather vague in their statement of the conversation.

3. Other Evidence Claimed to Support Order.

Outside of the time of the discharge and the statement of Warden, there is no substantial evidence of any kind to support the inferences drawn by the Trial Examiner and the Board in the findings as will be noted above. Reliance is had upon misquotations and misinterpretations by counsel. The inferences drawn by the Trial Examiner and the Board are not in any way binding upon this Court and this Court can draw its own inferences if they have reasonable support. As Respondent claims, the Order is only "buttressed" (Language of the Trial Examiner) by inferences and not by evidence.

IV.

RULES OF LAW GOVERNING THIS COURT IN THE CONSIDERATION OF THE QUESTIONS HERE INVOLVED

1. Inferences Drawn by Petitioner Are Not Binding Upon This Court.

As has been heretofore pointed out, it is not in reality the evidence that the Petitioner claims supports these findings and Order, but it is the inferences which the Trial Examiner and the Board have drawn from the evidence. In other words, it is the claim of the Petitioner that this Court is bound by the findings and Order because they are based upon substantial evidence. It is the law, however, that this Court is not bound by inferences drawn from that evidence by the Trial Examiner or the Board. This is very clearly pointed out in the case of *American Tobacco Co. vs. Katingo,* 194 Fed. 2d, 451, where the Circuit Court, 2nd Circuit, held the rule to be as follows:

> "We are not required, however, to accept a trial Judge's findings based not on facts to which a witness has testified orally, but only on secondary or derivative inferences from the facts which the trial Judge directly inferred from such testimony. We may disregard such a finding of facts thus derivatively inferred, if other rational derivative inferences are open. And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the testimony."

This is a very important distinction and applies particularly to this case where the Order is founded

wholly upon inferences which the Trial Examiner and the Board have drawn from evidence which is reasonably subject to an entirely different inference.

2. The New Rule Requires This Court to Weigh Testimony.

There is an extension of the field of review by the amendments to the Taft-Hartley Act which greatly broaden the field of review of this Court. One of the principal cases to this effect is that of *Pittsburgh S. S. Co. vs. N. L. R. B.,* in the United States Circuit Court of Appeal, 6th Circuit, 180 Fed. (2d) 731. The following quotation indicates the new rule:

> "The Board concedes that the review in this court is controlled by the two statutes, but contends that the scope of judicial review as to findings of fact has in no way been affected by them. We think this contention is erroneous. The provisions of §10(e) of the Administrative Procedure Act that the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be 'unsupported by substantial evidence' and that in making this determination the court shall 'review the whole record,' is new. Moreover, the rules concerning evidence have been expressly changed by both the Taft-Hartley Act and the Administrative Procedure Act. Section 10(b) of the Wagner Act provided that 'rules of evidence prevailing in courts of law or equity shall not be controlling,' and the Board's findings of fact were made conclusive by that statute [§10(e)] if they were 'supported by evidence.' In the Taft-Hartley Act [§10(b)] Congress eliminated this language and substituted a provision that hearings

'shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.' Section 10(c) of the Wagner Act was amended to require decisions of the Board to be supported by 'the preponderance of the testimony taken,' and §10(f) was amended to provide that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

This decision is affirmed by the Supreme Court of the United States in 340 U. S. 498; 95 L. Ed. 479.

Another very recent decision of the Supreme Court bears directly on this rule of law. In *Universal Camera Corp. vs. N. L. R. B.,* 340 U. S. 474; 95 L. Ed. 456, that Court points out the broader field imposed upon the reviewing court in examining the evidence supposed to support an order of the National Labor Relations Board. That court concluded a rather lengthy discussion with the following:

"It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that

to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment."

In addition to the above quoted, there are other statements by the Court which clearly show that the whole field of court review of findings of the N.L.R.B. has been changed and broadened by amendments to the Taft-Hartley Act and by the Administrative Procedure Act. Therefore, prior decisions which limit the right of review of the reviewing court, should not be followed.

The courts also have lately emphatically held that the reviewing court should give a reasonable construc-

tion to what is known as the "substantial evidence rule" and make a careful examination of the evidence. In one of the late cases, decided by the United States Circuit Court of Appeals for the 10th Circuit, on March 21, 1951, *N. L. R. B. v. Tri State,* reported in 188 Fed. (2d) 50, it was pointed out that the reviewing court should not be "merely the judicial echo of the Board's conclusion." The decision, at page 52, contains the following language:

> Prior to *Universal Camera Corp. v. N. L. R. B.,* 71 S. Ct. 456, we had not thought that the change in the phraseology of Section 10(e), wrought by the Taft-Hartley Act, established any different standard of proof for determining whether the Board's order should be enforced. See *N. L. R. B. v. Continental Oil Company,* 10 Cir., 179 F. 2d 552. In making pragmatic application of the substantial evidence rule, however, we have always recognized our ultimate responsibility for the rationality of the Board's decision, keeping in mind the central idea that the Board in the first instance—not this court—has the primary function of administering the Act, to effectuate the manifest congressional purpose. See *Boeing Airplane Co. v. N. L. R. B.,* 10 Cir., 140 F. 2d 423; *Harp v. N. L. R. B.,* 10 Cir., 138 F. 2d 546; *N. L. R. B. v. Denver Tent & Awning Co.,* 10 Cir., 138 F. 2d 410; *Nevada Consolidated Copper Corp. v. N. L. R. B.,* 10 Cir., 122 F. 2d 587, reversed 316 U. S. 105, 62 S. Ct. 960, 86 L. Ed. 1305. And, since the amendatory Act did not purport to curtail the power of the Board to prevent proscribed unfair labor practices, and since 'no drastic reversal of

> attitude was intended' by the change in terminology in Section 10(e), we perceive that the net effect of the *Universal Camera Corporation* case is to quicken the disposition of the appellate courts to vouchsafe the integrity of judicial review. In other words, our application of the substantial evidence rule should not be 'merely the judicial echo of the Board's conclusion.' "

In a later case, decided by the same Court on July 5, 1952, *N. L. R. B. v. Machine Products Co.,* 198 F. (2d) 313, that Court was considering the same kind of petition by the same Petitioner as herein involved, and the Court there concluded its decision as follows:

> "While we are not unmindful of the Board's prerogative in weighing the evidence and judging the credibility of the witnesses, we are poignantly aware of our ultimate responsibility for the rationality of the Board's decision. See *N. L. R. B. v. Tri-State Casualty Ins. Co.,* 10 Cir. 188 F. 2d 50.
>
> When all the evidence is viewed in the context in which it was given, we are convinced that it does not support the Board's order, and enforcement is denied."

Even under the old rules, the courts have broadened the substantial evidence rule beyond the limits contended for by the Petitioner herein. It has been held repeatedly that the substantial evidence rule means more than a mere scintilla, and that the reviewing court is bound to review the evidence carefully to ascertain whether or not there is substantial evidence supporting the findings and the order.

A very pertinent decision is that of *N. L. R. B. v. Union Pacific Stages,* 99 F. (2d) 153, a decision handed down by this very Court on September 23, 1938. It contains a great deal that is applicable to the case before us. The following short quotation is particularly pertinent to the point under discussion:

> "It is suggested that this court should accept the findings of the Board; that contradictions, inconsistences, and erroneous inferences are immune from criticisms or attack by Section 10(e) of the Act, 49 Stat. 453, 29 U. S. C. A., §160(e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.
>
> "'We are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. 29 U. S. C. A. §160(e) (f); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board,* 301 U. S. 142, 57 S. Ct. 648, 650, 81 L. Ed. 965. . . . Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. *Pennsylvania R. Co. v. Chamberlain,* 228 U. S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819.' *Appa-*

lachian Electric Power Co. v. N. L. R. B., 4 Cir. 93 F. 2d 985, 989.

"'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and considering them in their entirety and relation to each other, arrives at a fixed conviction.

"'The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injuctices be wrought.' *National Labor Relations Board v. Thompson Products, Inc.,* 6 Cir., 97 F. 2d 13, 15."

One of the many cases involving this proposition of law rests upon facts very similar to those in this case. It is the case of *Hazel-Atlas Glass Co. v. N. L. R. B.,* Circuit Court of Appeals, 4th Circuit, 127 F. (2d) 109, and that Court said at Page 117:

"Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion', *Con-*

solidated Edison Co. v. National Labor Relations Board, supra, [305 U. S. 197, page 229], 59 S. Ct. [206], 217 [83 L. Ed. 126], and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *National Labor Relations Board v. Columbian Co.,* 306 U. S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660.55

V.

THE EVIDENCE MUST MORE THAN RAISE A SUSPICION

It has been repeatedly held that in order to justify an order reinstating an employee, the evidence relied upon must be more than a mere scintilla and must raise more than a suspicion. In the case at bar the evidence, at the most, raises only a suspicion. Nowhere is there the slightest evidence directly involving any representative of this Company in any words or acts which would indicate that the discharge here in question was for union activity. It may be true that a discharge two weeks after the union activity might raise a suspicion. But that is not sufficient. At the outset it must be remembered that only the one man out of five involved in the activity was discharged, and he was not the leader or spokesman, and his record otherwise justified his discharge. The courts have had occasion frequently to warn the reviewing courts against upholding an order where the supporting evidence raises no more than a suspicion. The rule cannot be more clearly stated than it was by the Circuit Court of Ap-

peal, 4th Circuit, in *Appalachian Electric Power Co. v. N. L. R. B.*, 93 F. (2d) 985, 989:

> "We are bound by the Board's findings of fact as to matters within its jurisdiction, where, the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. 29 U. S. C. A. §160(e) (f); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board,* 301 U. S. 142, 57 S. Ct. 648, 650, 81 L. Ed. 965. The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. . . ."

In a later decision, by the Circuit Court of Appeals, 6th Circuit, *N. L. R. B. v. Thompson Products, Inc.,* 97 F. (2d) 13, 17, the court took occasion to say that interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in in applying the National Labor Relations Act, and warns against promoting discord between employer and employee by upholding an order based only upon a scintilla of evidence. That Court said:

"Interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in when applying the Labor Relations Act and, where the employee admits he is performing his work negligently, the evidence should be strong and convincing that he was discharged for union activities before reinstatement by an administrative board.

"There is a scintilla of evidence in this case that the union activities of the three employees were factors in their discharge but, from their own testimony, the employer would have been justified in discharging them had there been no effort to organize its employees in a union. The Board's finding in this case tends to destroy the purpose of the Labor Relations Act and to promote discord between employer and employee instead of harmonious and joint discussion of their difficulties, and is not sustained by substantial evidence. The petition will therefore be denied and decree entered accordingly."

The same rule is followed by the Circuit Court of Appeals, 5th Circuit, in *N. L. R. B. v. Bell Oil & Gas Co.,* 98 F. (2d) 407, 410. As a part of its decision, that Court said:

"Since there is nothing in the statute indicating an intention to modify the rules of evidence prevailing in courts of law or equity, they are controlling in this case. The evidence to support a finding of the Board should furnish a reasonably sound basis from which the facts in issue may fairly be inferred. A good rule for weighing the evi-

> dence to ascertain whether it is adequate for the purpose mentioned is to compare it with the evidence necessary to sustain the verdict of a jury upon a similar issue. Such evidence must be substantial. A scintilla of evidence which creates a mere suspicion, or evidence which gives equal support to inconsistent inferences, is not sufficient. *Appalachian Electric Power Co. v. National Labor Relations Board,* 4 Cir., 93 F. 2d 985."

While there are numerous other cases, the above are sufficient to establish the rule peculiarly applicable to this kind of case. All decisions above quoted are in cases brought by the N. L. R. B. It needs no argument here to convince this Court that it was never intended by Congress that the N. L. R. B. should have the right to interfere with the discharge of employees by employers unless a violation of the statute is established by really substantial evidence and by more than evidence creating a mere suspicion. Applying the above rules to the evidence here, it will immediately appear that even the evidence, as cited in Petitioner's brief, falls far short of being substantial in the true sense. More than that, however, after this Court has considered the evidence produced here by Respondent, it will conclude that the order is based upon the weakest kind of evidence and inferences, and that the Trial Examiner has not given any fair consideration at all to the evidence presented by Respondent.

Counsel has pointed out above that the findings are supported only by conjecture and suspicion, and the

preponderance of the evidence is contrary to the findings. An example of suspicion is the emphasis that the Trial Examiner places upon the time of the discharged Newsom as coinciding with his union activities. Other findings also seem to be based on suspicion. But it is well in considering this matter to keep in mind the other rulings of the Circuit Courts of the United States.

Several times the Circuit Courts have held that any order, to be enforceable, must have the support of substantial evidence and must not be based on surmise or suspicion.

> "Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and *surmise or suspicion, even though reasonable, is not enough. . . .*" *National Labor Relations Board v. Williamson-Dickie Mfg. Co.,* 130 Fed. (2d) 260, 263.

In the above cited case there is a further expression of the United States Circuit Court of Appeals, Fifth Circuit, that bears repetition:

> "In view of the very large powers and wide discretion granted by the Act to the Board and the grave consequences of an abuse of these powers and this discretion by the Board, we cannot, in the exercise of our function in refusing to enforce

those which are not, too often repeated, that it has not been given to the Board to substitute its own ideas of discipline and management for those of the employer. It has not been given to it to supervise and control, except as precisely set out in the Act, or set standards for, the supervision and control of employee and employer relations." Page 267.

In several other cases the Courts have repeated the rule. Here follows a few instances:

N. L. R. B. v. Tex-O-Kan, Etc., 122 Fed. (2d) 433, 438;

N. L. R. B. v. Goodyear, Etc., 129 Fed. (2d) 661, 664;

Magnolia Petr. Co. v. N. L. R. B., 112 Fed. (2d) 545, 548.

Another decision of the Circuit Court of Appeals of the Fifth Circuit points out the care that should be taken by the Board to make its order legal, and to base its decisions on sound evidence. In *National Labor Relations Board v. Goodyear Tire and Rubber Co. of Alabama,* 129 Fed. Rep. (2d) 661, 664, that Court said:

"Accepting the preliminary fact findings of the Board as correctly found as to each, we think it clear that under the controlling principles of law its ultimate finding in each case, except that of Parker, is wholly without support in the evidence. Taking them individually and as a whole, the ultimate findings or inferences of the Board were based on nothing more than that the evidence

showed antipathy to United, and the persons discharged in each case for an assigned cause, were members of or applicants for membership in United. This will not at all do. Nothing is better settled in the law than that while discharges may not be made because of and to discourage union membership or activity, membership in a union, is not a guarantee against discharge, nor does the fact alone, that an employer dislikes a union or a union man, prevent his exercising his undoubted right to discharge. Findings of the Labor Board just as findings of a jury, must rest upon evidence, not surmise or suspicion, *Magnolia Petroleum Company v. N. L. R. B.*, 5 Cir., 112 F. (2d) 545. It is only fair to say however that the confusion of law in the mind of the Board, that antipathy toward a union once shown to exist, is all the evidence needed to convict of a discharge as an unfair practice, is a natural one. It arises from the fact of the Board's dual relation to the charge. Its right hand accusing, its left hand hearing as a judge, it is the most natural thing in the world for the Board to sometimes forget that as accuser it must make, as judge it must have, not surmise but proof, of the facts on which a finding of unfair practices is to be based. Quite natural too is it that occasionally the suspicion, surmise, feeling and conviction which give legitimate force and vigor to it as prosecutor, should, in its dual capacity, be allowed to suffice for proof. But this of course will not do. For the Board as accuser must furnish to itself as judge, proof in such amount and quality, that one having no interest whatever as accuser and interested only in a just result,

could reasonably draw the inferences of guilt which as accuser, it belabors itself as judge to draw."

VI.

THE BURDEN OF PROOF

One thing that seems to have been entirely overlooked by the Trial Examiner and the Board is that the burden of proof was upon the general counsel and individual employee and not upon the Respondent. This rule of law should be strictly followed, particularly in this kind of a case.

In considering the contentions here made by the respondent employer and in determining whether or not the evidence justifies the findings of the Trial Examiner, this Court should consider the rules of law that govern a proceeding such as this and the final determination of the National Labor Relations Board. It is undisputed that the Employer in this case has the absolute right to discharge an employee for any cause whatsoever except only for union activity. This rule needs no citation, but it will be found stated in the case of *National Labor Relations Bd. v. Tex-O-Kan Flour Mills Co.,* 122 Fed. (2d) 433, 438:

> "So far as the National Labor Relations Act, 29 U.S.C.A., Sec. 151 et seq., goes, the employer may discharge, or refuse to reemploy for any reason, just or unjust, except discrimination because of union activities and relationships. . . . "

Another cardinal principle which must be borne in mind is that the presumption is that the employer has not violated the law and the burden of proof is therefore not upon the employer, but upon the one who asserts the fact, to prove that the discharge was because of union activity.

> "It is unnecessary for an employer to justify the discharge of an employee so long as it is not for union activities. The presumption is that the employer has not violated the law, and the burden of proof is not upon the employer, but upon the one who asserts the fact, to prove that the discharge was because of union activities. . . . " *N.L.R.B. v. Union Mfg. Co.,* 124 Fed. (2d) 332, 333.
>
> "In sponsoring the charges of Oil Workers' International Union, No. 243, and issuing its complaint thereon, the Board was acting purely in its accusatorial capacity and in that capacity it, of course, had the burden of proof to establish before itself, in the capacity as trier, the accusations it had laid. In its capacity as accuser, the Board like any other 'person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence from which men of unbiased minds can reasonably decide in his favor.' It cannot any more than any other litigan can, 'leave the right of the matter to rest in mere conjecture and expect to succeed.' *Samulski v. Menasha Paper Co.,* 147 Wis. 285, 133 N. W. 142, 145."
>
> *Magnolia Petroleum Co. v. National Labor* Relations Bd., 122 Fed. (2d) 545, 548.

Therefore, the Petitioner would not have the power to order reinstatement in this case, unless the burden of proof had been met by the accuser and the fact established by clear and convincing evidence.

Counsel regards this rule of law as having an important bearing upon the decision herein. The Board should not render a decision supported by law unless it gives the presumption of honest dealing and of obedience to the law to the Respondent, and requires its accuser to assume the burden of proof and to prove the case by preponderance of the evidence.

In another case, *N. L. R. B. vs. Ray Smith Transport Co.,* 193 Fed. (2d) 142, 5 Cir. (1951), the facts were: One truck driver, Hillin, asked another, the dischargee Bain, about the latter's attempt to organize respondent's employees, and who was among this group of organizers. Bain alone testified as to this conversation. The Board then made several inferences, not grounded by testimoy, that Hillin communicated this information to his employer, and further inferred that the employer discharged Bain and others for this activity. The court said at p. 144:

> "Turning to the evidence in respect of the discharge, because they are the gravamen of the Board's case, indeed they are the pivot on which it turns, it is at once evident that, to the mind of the examiner, the burden was not on the Board to prove that they were for union activity, but on the Respondent to prove that they were for cause, and also that, to his eager credulity, straws in the

wind, offered in support of the Board's case, became hoops of steel, and trifles light as air were confirmations strong as proofs from Holy Writ.

". . . It was this attitude, and this alone, which enabled the examiner to disregard and discredit the positive testimony, not only of every employee of the Respondent, but of disinterested witnesses, customers of the Respondent, who testified positively to the discourtesies to them for which Bain and Veazy were discharged."

Again at page 146:

"The findings were contrary to the law, because as we pointed out in *N.L.R.B. v. Fulton,* 5 Cir., 175 Fed. (2d) 675, 290 U.S.C.A. §160(c) prohibits the Board from requiring the reinstatement of any individual, 'if such individual was suspended or discharged for cause', and because as we pointed out in the same case 'this court, before the amendment of the National Labor Relations Act, held without varying that membership in a union is not a guarantee against discharge and that when real grounds for discharge exist, the management may not be prevented because of union membership from discharging."

This is another case that directly applies to the facts in the case before us.

VII.

PETITIONER ERRONEOUSLY RELIES ON STATEMENT OF WARDEN

The statement of Warden, the Technical Engineer heretofore referred to, has been erroneously relied upon by the Petitioner. The decisions on this very point of the Circuit Courts require that this statement be wholly ignored, because the statement of a supervisory employee is not binding upon his employer, and therefore is not in any way controlling in this case or binding upon the Respondent. This would seem to be obvious, but it has been ignored entirely by the Petitioner and therefore a few cases will support our above statement.

Mr. Warden was at the time an instrument engineer (R. 189). There is no evidence that he was authorized to make the statement by anyone in authority. It was wholly on his own, if made at all. He is pretty well down the list in the chain of command and certainly without further proof he has no authority to bind his employer, the Company. He was only one grade above Newsom, being an instrument engineer as against an instrument technician. It might as well be said that statements of Newsom or Fowler are binding upon the Company and commit it to a policy. For the moment, disregarding the contradictions and the lack of clear proof of the statement attributed to Warden for the purpose of this argument alone, we can assume that the remarks were made as claimed by Newsom. The following rules of law will therefore apply. These cases are cited and a brief summary of the facts included:

N. L. R. B. v. Tennessee Coach Co., 191 Fed. (2d) 546 (C. A. 6th Cir., 1951). An assistant superintendent asked an employee how their negotiations to join a union were going; the worker responded that they "would go in for 90%". The superintendent then said that he woud hate to see it go through, and that if it did the president of the coach company "would sell out to big Greyhound and it would ruin them." Similar statements were subsequently made by this same superintendent. The court, at Pages 554-555, said:

> "Whether acts of supervisory employees constitute restraints upon union activity on the part of a company must be viewed to a large extent, against the background of the company's attitude, policy and practice in the past with regard to such matters. Where an employer has no history of labor trouble or union hostility, and repeatedly advised its employees, in unmistakable terms, that they might, without fear of reprisal, exercise freedom of choice in their actions and opinions on labor matters, expressions of union hostility by some of the supervisory employees are to be regarded as the individual views of such employees, rather than as the views of the employer (citing cases). Isolated or casual expressions of individual views made by supervisory employees, not authorized by the employers, and not of such a character or made under circumstances reasonably calculated to generate the conclusion that they are the expression of his policy, fail to constitute interference with the employees in the exercise of their right of self-organization. (citation); and in

a labor controversy, where a general manager of a corporation told the employees that they would get nothing from joining a union, and that it was organized by racketeers, together with other similar statements, all of which were made without threatened, coercive, or punitive action, it was held that such statements were within the right of free speech. *Jacksonville Paper Co. v. N. L. R. B.,* 5 Cir., 137 Fed. (2d) 148. In *N. L. R. B. v. Hinde & Dauch Paper Co.,* 4 Cir., 171 Fed. (2d) 240, where it appeared that a foreman had inquired of an employee how she intended to vote, and stated to another employee, that if the plant was organized, the owner woud close it down, the court denied enforcement of the Board's order based on such statement and inquiry, on the ground that there was nothing to show that they were made with the approval of the management or that they constituted part of a program of intimidation."

N. L. R. B. v. Hart Cotton Mills, 4 Cir., 1940 Fed. (2d) 964 (1951): Here a supervisory employee told 8 out of 557 striking employees that if the striker would go back to work at the request of the corporation, his job would be easier than if he went at the direction of the labor union, or that the striker would get his vacation pay, or that payment of compensation for injury would be facilitated or that if the striker did not return, his job would be filled by another and that the union would never get a contract. The Court said, at page 974:

"An employer's responsibility for the acts of his supervisor is not determined by applying principles of agency or respondent superior but by ascertaining whether the conduct or activity is condemned by the Act."

". . . isolated statements by supervisors contrary to the proven policy of the employer, and neither authorized, encouraged nor acquiesced in by him, do not constitute substantial evidence of interference or coercion."

N. L. R. B. v. West Ohio Gas Co., 6 Cir., 172 Fed. (2d) 685 (1949): Here one employee alleged that the general superintendent had said to him something to the effect that "there would never be a union around any company where the superintendent worked." The incident occurred while a decision was pending whether the employees of the defendant corporation were to withdraw from their union, petition for withdrawal having been prepared through the assistance of the employer. The court said, at page 688:

"assuming it (the statement) had been made, there was no evidence that it was coupled with any threat against any employee or organization. Such an isolated statement, in absence of circumstances evidencing coercion, does not constitute violation of the statute (citing cases)."

Sax v. N. L. R. B., 7 Cir., 171 Fed. (2d) 769 (1948): Three workers were asked by one supervisor if they were for a union and why; and another supervisor

made similar remarks to another worker. At page 733, the court said:

> "Mere words of interrogation or perfunctory remarks, not threatening or intimidating in themselves, made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees, cannot, standing naked and alone, support a finding of a violation of Section 8 (1)."

Similar language may also be found in the following cases which are less closely related to the San Diego Gas and Electric Company case than are those cited above.

N. L. R. B. v. Arthur Winer, Inc., 7 Cir., 194 Fed. (2d) 370 (1952) which at page 372 quotes *John S. Barnes Co. v. N. L. R. B.,* 7 Cir., 190 Fed. (2d) 127, 130 (1951) where it was said:

> "However the courts have not considered isolated remarks or questions which did not in themselves contain threats or promises, and where there was no pattern or background of union hostility, as coercion of the employees and as a violation of Section 8 (a) (1)."

And in *N. L. R. B. v. Mayer,* 5 Cir., 196 Fed. (2d) 286 (1952), (which involved the remarks of an assisting friend of the employer rather than a supervisory employee) it was said at page 290:

> "In order to charge any employer with the acts of another for the purpose here under consideration, such person must be one who in fact and law is the employer's agent. Such person must act under the employer's control and direction, or under his orders, or, if the acts were originally unauthorized, they must be ratified, expressly or impliedly, before they can be attributed to the employer."

Other cases which should be considered are the following:

N. L. R. B. v. Reliable, etc., 187 Fed. (2d) 547, 552:

> "It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the union."

In the case of *Indianapolis, etc. v. N. L. R. B.,* 122 Fed. (2d) 757, at 762, the court referred to a conversation with the chief engineer upon which the Board relied in support of its order. That court however refused to support the order on the ground that the evidence showed merely a conversation with the chief engineer and that the employer was not responsible for his actions.

In the case of *Balston v. N. L. R. B.,* 98 Feb. (2d) 758, at 762, which has been heretofore cited on another point, the court held that threats of supervisory employees were not binding upon the employer.

In a late case the Circuit Court of Appeals, 3 Cir., on April 17, 1941, in the case of *Quaker State Oil Refining Corp. v. N. L. R. B.,* 119 Fed. (2d) 631-633, said:

> "It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union. The Board nevertheless found that the petitioner was responsible for the statements made by Healy and McElhatten and that thereby it interfered with, restrained and coerced its employees in the exercise of the rights of self-organization and collective bargaining guaranteed them by Section 7 of the National Labor Relations Act, 29 U.S.C.A. §157. We do not think that this finding is supported by substantial evidence. Isolated statements by minor supervisory employees made casually in conversation with fellow employees without the knowledge of their employers and not in the course of their duty or in the exercise of their delegated authority over those employees ought not to be too quickly imputed to their employer as its breach of the law. *N. L. R. B. v. Whittier Mills Co.,* 5 Cir., 111 F. 2d 474, 479. This is particularly so where, as here there is no evidence of any policy on the part of the employer to authorize or encourage opposition to union activity. *Martel Mills Corp. v. N. L. R. B., supra,* 114 F. 2d page 633."

In another late case the Circuit Court of Appeals of the 4th Circuit in the case of *N. L. R. B. v. Mathie-*

son, 114 F. 2d 796, 802, held that isolated casual speeches made by underlings having some authority are not binding upon the employer. The ideas are clearly their own.

Consequently the remarks attributed to Warden were clearly his own, and were an isolated casual conversation. From the context of the statement as described by Newsom it is clear that the remarks were only notions of Warden, if made at all. In view of the overwhelming authority cited above, these remarks are not in any way binding upon the Respondent. This being so, these remarks must be disregarded. Without them, the Petitioner has no case at all. He is left with nothing but a suspicion because of the timing of the discharge.

A reading of the findings will disclose that the Trial Examiner and consequently the Board repeatedly "buttressed" their findings on this statement of Warden; they rested their entire case upon it. Repeated references are made in support of the finding that Warden's remark was made, by reference to the evidence.

A good example is found at R. 30 where the Trial Examiner in his concluding findings says:

> "The undersigned further finds that by Warden's statement to Fowler, Newsom and Shroble on January 16, 1951, that they might lose their jobs if they continued their union activities, the Respondent violated Section 8 (a) (1) of the Act."

Never once does the Trial Examiner or the Board even question that such a remark by such an employee was binding upon Respondent.

VIII.

EMPLOYER HAS A RIGHT TO DISCHARGE FOR ANY CAUSE EXCEPT FOR UNION ACTIVITY

It is quite clear without citation that the employer has an unlimited right to discharge an employee for any cause so long as he does not do so for union activity. While this seems obvious, the tendency of the Petitioner is to disregard it entirely. In the first annual report of the National Labor Relations Board in 1936, at page 77, is found the following:

> "This section [Sec. 8 (a) (3)] is not intended to interfere with the freedom of an employer to hire and discharge as he pleases. It limits his freedom, however, in one important respect. He may not use it in such a manner as to foster or hinder the growth of a labor organization. He may employ anyone or no one; he may transfer employees from task to task within the plant as he sees fit; he may discharge them in the interest of efficiency or from personal animosity or sheer caprice. But, in making these decisions he must not differentiate between one of his employees and another, or between his actual and his potential employees, in such a manner as to encourage or discourage membership in a labor organization."

In the case of *Appalachian, etc. v. N. L. R. B.*, 93 Fed. 2d 985, the Circuit Court of the 4th Circuit

pointed out that the Labor-Management Act does not and should not interfere with normal acts of discharge or with the control of the business of an employer, and in that particular case discouraged the Board from extending its right to set aside discharges occurring in the ordinary conduct of business.

In the case of *N. L. R. B. v. Thompson,* 97 F. 2d 13, the Circuit Court of the 6th Circuit clearly pointed out that the Board should not interfere with the employer's prerogative to judge the inefficiency of its own employees. This rule is particularly applicable here. The Respondent is a very large public utility engaged in supplying electricity to a great city. The instrument technicians have a great deal of responsibility, and a great deal of confidence must be imposed in them or else the huge machines may break down causing great damage and discomfort to industry as well as to the people of the whole city. No one is better able to judge the efficiency of this employee than the technical men who have here testified, who are the station chiefs, the superintendent of production and the efficiency engineers who hold their positions after establishing years of experience. Their testimony and their judgment however have been entirely disregarded by the Trial Examiner and the Board. This very Court, in the case of *N. L. R. B. v. Union Pacific Stages,* 99 F. 2d 153, also declares itself on the same subject and holds that the Board should not be permitted to interfere with the judgment of the employer in normal cases.

IX.

UNION ACTIVITY DOES NOT PROTECT EMPLOYEE

If the Petitioner here is correct and the fact that the discharge occurred shortly after the appearance of union activity is substantial evidence supporting the Order, it would mean that union activity would always be used to protect the inefficient employee.

It should be obvious that the fact that at the time of the discharge the employee was engaged in union activity is not of itself sufficient to justify an order of reinstatement. An employee is not protected from discharge merely by the fact that he is engaged at the time of discharge in union activity. Otherwise, inefficient employees could not be discharged at all as they could insure their positions by indulging in union activity. It does not seem necessary to cite authority for such a proposition but courts have declared the law. In the case of *National Labor Relations Bd. v. Goodyear Tire and Rubber Co.,* 129 F. 2d 661, the Court made some pertinent remarks on this subject which will bear consideration. On page 665 of that report we find the following:

> "We and other courts have in many cases set down the rule which must guide the Board in deciding matters of this kind. In *N. L. R. B. v. Riverside Mfg. Company,* 5 Cir., 119 F. 2d 302, at page 307, we said of a discharge: 'The only facts found which at all tend to support the Board's conclusion that he was discharged for union activity are that he was a member of the union, and the manage-

ment did not like the union or his belonging to it, and had said so. If real grounds for discharging him had not been shown, or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative force. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for discharge exist, the management may not be prevented, because of union membership, from discharging for them.'

"In *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, 5 Cir., 122 F. 2d 433, 438, 439, we said: 'In the matters now concerning us, the controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to re-employ in each instance. There is no doubt that each employee here making complaint was discharged, or if laid off was not reemployed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but something else which

> in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. This was squarely ruled as to a jury in *Pennsylvania R. R. Co. v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, and the ruling is applicable to the Board as fact-finder.' ''

This holding of the Circuit Court of Appeals is also very enlightening in that it considers the exact question that counsel for Respondent presents here, and we quote again this pertinent language:

> "If he says (Employer) it was not Union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point."

As counsel has repeatedly insisted, the sworn testimony of the executives of Respondent cannot be disregarded because of the suspicion in the mind of the Trial Examiner that the cause of discharge was other than that stated by them.

X.

A WIDE LATITUDE SHOULD BE ACCORDED RESPONDENT IN THE MATTER OF DISCHARGE

It should be obvious without any discussion that the management of this great public utility should be allowed wide latitude in the matter of discharge of its employees and particularly of an instrument technician who works upon the great engines that develop the tremendous amount of electricity required to supply the inhabitants of this city. Mr. B. L. Stovall, now in the United States Navy and formerly engineering assistant and later junior engineer and efficiency engineer and assistant station chief at Station B, referred in the following language to the result of lack of confidence in the instrument technician: "It would result in apprehension on the part of the operators assigned to a particular boiler operation where tremendous quantities of fuel are involved and fires are 3,000 degrees hot and faults and variations must be instantly noted. The automatic controls of both stations have to take care of these fluctuations. If they don't the operators are in trouble and combustion is thrown completely off, with attendant smoke and the danger of explosion inside the plant itself. All of this depends upon good instrument technicians" (R. 318).

As stated by Mr. Hathaway, the Superintendent of Production, an instrument technician's work is very important in that he controls the operations of the nervous system of the production of the electricity for the community and the technicians handle the equipment that is used to determine the proper operation.

The operation itself is automatically controlled, which also does the operating of the largest unit in the system, so it is very important they be properly calibrated and in proper operating order. An instrument man is more or less in a key position in that he must not only do his work well and keep the instruments in perfect working shape but must coordinate his effort with the operating men and the maintenance men as well as the supervisors. It requires a man of good personality as well as good technical training. It is definitely a very important position. (R. 373, 374). In determining whether or not Mr. Newsom's employment should be terminated Mr. Hathaway, Superintendent of Production, submitted the matter to his two station chiefs, to his efficiency engineer, to his instrument engineer, and they all determined and unhesitatingly voted to terminate his employment on the ground that he was inefficient and unsatisfactory. They also testified that they were not influenced in the slightest degree by Newsom's union activity.

Now the Trial Examiner and the N. L. R. B., with no experience or technical knowledge whatsoever and without any responsibility to produce electricity whatsoever, set aside the considered judgment of these experts and substituted their own views upon a slight suspicion only. The testimony of these experts, plus the other efficiency engineers who have left the company's employment, was entirely disregarded by the Trial Examiner and dismissed with a wave of the hand and a statement that they were unworthy of belief. No impeachment or contradictions whatsoever of these

witnesses was shown in the evidence. Their experience and training was testified to, and establishes that they were men of unusual experience and training.

XI.

PETITIONER RELIES UPON LACK OF EARLIER DISCHARGE

The Petitioner herein relies in support of its Order upon its contention that the employer had retained Newsom in its employ for many months after finding inefficiency in his work and then chose to discharge him two weeks after his union activity appeared. By this reliance the Board takes the position apparently that the employer is estopped from discharging the employee after he engages in union activity, regardless of how bad his record might have been before that time. This has been argued heretofore.

In this case the testimony of all the witnesses for the Respondent was that since early in 1950 complaints had been made about the work of Newsom, and conversations were had with him by his supervisors in an effort to correct his "sloppy" work. Those in the best position to know, such as Warden, his immediate superior, complained of him repeatedly and stated that his work did not improve. There were two particular reasons why his discharge occurred when it did, besides incidents of his inefficiency. It did not occur earlier because the Company had completed the overhauling schedule for 1950, after having been very busy because of the damage to a turbine (R. 263); and fur-

ther, because the training program presented to the supervisors was to be taken up (R. 263). This program was put into effect shortly after the 1st of February, 1951. The training program was fully discussed at the meeting of January 30th in Hathaway's office, and in this conversation qualifications of Newsom came up for discussion (R. 332, 367, 370, 386). A very good statement of what occurred at the meeting of January 30th is contained in the testimony of Kenneth Campbell, Station Chief at Station B:

> "Q. Will you state what occurred at that meeting?
>
> "A. That was a meeting of the station chiefs and the department superintendents. During that meeting our work was interrupted, at which time Mr. Kalins and Mr. Warden came up to present a program, a request for a program on training of instrument men.
>
> "There was a general discussion of the values of the program and some discussion of the details of handling it. It was decided that the program would be put into effect, and after that was decided there was a question in regard to how the instrument men were getting along.
>
> "At this time it was reported by either Mr. Warden or Mr. Kalins, I am not sure which, that his work was still not satisfactory. There was a general discussion as to what should be done with him, and each man in the group had an opportunity to express his views, based upon his experience and judgment. It was decided that for the good of the entire department it was better if Mr. Newsom would be terminated.

"Q. Did you express your opinion at that meeting?

"A. I did.

"Q. Will you tell us what you said?

"A. I can't tell you exactly, but my opinion was that due to his inability to adjust himself to the conditions of the job, that he should be terminated from that department.

"Q. Now, were you actuated in giving that opinion by the fact that Newsom had been involved in union activity? Would that affect you in any way in the termination of any man, whether he had been in union activity or not?

"A. Not in the least.

"Q. Did you have union men working under you?

"A. Almost all the men are union men. We have exceptionally good relations with them.

"Q. You have no objections to union men.

"A. Not at all. I have been a member myself."

This Court, knowing that the burden of proof was upon the general counsel at the hearing and that the Respondent is presumed to comply with the law, and that nothing is in evidence to indicate that these witnesses were unreliable or dishonest or untruthful, should hold that the only possible finding that could have been justified under the evidence was that the discharge of Newsom was due to proper causes and not to union activity.

XII.

RESPONDENT'S RECORD OF LABOR RELATIONS WAS GOOD

In many of the cases decided by the Courts, an important consideration in considering the evidence is whether or not the employer had a good record of relations with the union. The testimony here shows that a large part of the men were members of the union and that the relations between the company and the union were excellent. Most of the witnesses for the Respondent had been members of the union, and all testified, as did Campbell above, that they had no prejudice whatsoever against the union and that the discharge was not in any way motivated by union activity. In respect to the relations with the union, Mr. Hathaway testified as follows:

> "Q. Mr. Hathaway, you say, then, in your department a large portion of the men are members of the union?
>
> "A. That is correct, yes.
>
> "Q. Is there any reason that you know of now, either in company policy or in your policy, that woud require you or would cause you to discharge a man because he was engaged in union activity?
>
> "A. Certainly not.
>
> "Q. To your knowledge, has it ever been done by your company?
>
> "A. It has not been done since I have been with the company, certainly not.

"Q. Has there ever been any discouragement given to the men to discourage them from joining the union?

"A. No.

"Q. Would you say that in deciding to terminate Mr. Newsom's employment that his union activity was in any degree a contributing factor?

"A. No, it was not." (R. 372).

The only instructions given by Mr. Noble, Assistant General Manager and the superior to Hathaway, were as follows:

"I told Mr. Noble these men had discussed representation by the union and that one of these men had not been satisfactory as an instrument man; that we had definitely decided that he was not good and would probably ask him to terminate.

"I asked him whether I should postpone the action until the end of the union negotiations or whether I should go ahead and act exactly as if the union negotiations had not been brought up.

"TRIAL EXAMINER MYERS: When was this?

"THE WITNESS (Mr. Hathaway): Sometime between January 15th and January 30th.

"TRIAL EXAMINER MYERS: All right.

"Q. (By Mr. Luce): Did Mr. Noble at any time advise you or instruct you to terminate Mr. Newsom's employment?

"A. Yes. He said if the man's work was not satisfactory, by all means to terminate him. He left the judgment up to the department, however, as to whether he was satisfactory.

"Q. And did you refer to his union activity as any reason why he should be terminated?

"A. No." (R. 371-372).

It must be also taken into consideration that no evidence at all was offered by the side upon which the burden of proof rested that there had been any indication of unfriendliness to the union or pressure against union activity, on the part of the Respondent.

In another case, *N. L. R. B. v. Ray Smith Transport Co.,* 193 F. 2d 142, 5 Cir. (1951) the facts were: One truck driver, Hillin, asked another, the dischargee Ban, about the latter's attempt to organize Respondent's employees, and who was among this group of organizers. Bain alone testified as to this conversation. The Board then made several inferences, not grounded by testimony, that Hillin communicated this information to his employer, and further inferred that the employer discharged Bain and others for this activity. The court said at page 144:

> "Turning to the evidence in respect of the discharge, because they are the gravamen of the Board's case—indeed they are the pivot on which it turns, it is at once evident that, to the mind of the examiner, the burden was not on the Board to prove that they were for union activity, but on the Respondent to prove that they were for cause, and also that, to his eager credulity, straws in the wind, offered in support of the Board's case, became hoops of steel, and trifles light as air were confirmations strong as proofs from Holy Writ.

". . . It was this attitude, and this alone, which enabled the examiner to disregard and discredit the positive testimony, not only of every employee of the Respondent, but of the disinterested witnesses, customers of the Respondent, who testified positively to the discourtesies to them for which Bain and Veazy were discharged."

Again at page 146:

"The findings were contrary to the law, because as we pointed out in *N. L. R. B. v. Fulton,* 5 Cir., 175 F. 2d 675, 290 U.S.C.A. §160 (c) prohibits the Board from requiring the reinstatement of any individual, 'if such individual was suspended or discharged for cause'. This court, before the amendment of the National Labor Relations Act, held without varying that membership in a union is not a guarantee against discharge and that when real grounds for discharge exist, the management may not be prevented because of union membership from discharging."

This is another case that directly applies to the facts in the case before us.

XIII.

FINDINGS OF TRIAL EXAMINER SHOW FAILURE TO FAIRLY WEIGH TESTIMONY

When the findings of the Trial Examiner within themselves show that the testimony of the parties was not fairly weighed; that is, that he unreasonably simply disregarded the Respondent's testimony; this, of course, woud indicate either prejudice, bias or inability to try the matter fairly. In such case, the reviewing court should, in view of the above cited decisions, review the evidence with the greatest of care.

The Board affirmed the findings of the Trial Examiner (R. 92).

In order to reach his conclusion, the Trial Examiner found that the testimony of Newsom impressed the Examiner, but that, on the other hand, Warden's did not impress him as truthful. However, in order to arrive at his conclusion, the Trial Examiner entirely ignored or refused to believe the testimony of Hathaway, Hardway, Kalins, Campbell, Stovall and Zitlaw, in addition to refusing to believe the testimony of Warden. The Examiner gives no reason why the testimony of these witnesses should be entirely ignored. Their testimony is not contradicted by any evidence at all and they are not impeached in any manner. There appears no fair reason in law why that testimony of the Respondent should be wholly ignored. In the testimony of these men is to be found good and substantial reasons why Newsom's employment was terminated and why it was not terminated sooner, and also is to

be found a positive and direct denial that the union activity of Newsom was any factor at all in the termination of his employment. Surely that evidence cannot be arbitrarily brushed aside. See *N. L. R. B. v. Goodyear,* 129 Fed. 2d 661.

The Concluding Findings of the Trial Examiner (R. 26) are based principally on two findings of the Examiner. First, that the discharge was not for cause, as "it seems incredible that if Respondent considered Newsom as guilty of all the shortcomings which it now attributes to him, that it woud have retained Newsom in its employ as an Instrument Technician so long as to become the oldest Technician in point of service." This is purely an inference (or rather an argument), drawn by the Trial Examiner. The reasons for the discharge and for retaining Newsom as long as the employer did, and the reasons why he was discharged at this particular time, have all heretofore been pointed out. This, being only an inference, is not binding upon this court. In the opinion of the Trial Examiner, this finding is "buttressed" by seven inferences, pointed out in the findings (R. 26, 27). These are all inferences which are not justified by the evidence. They consist of a passing remark made by Hardway in a friendly manner to Newsom after Newsom had left the Company; a remark of Kalins that if Newsom resigned, it "would make things easier"; a remark of Campbell in saying goodbye to Newsom, that he would make his mark sometime; Warden's statement that he was the only one in the department who could do some

routine work satisfactorily; Warden's admonition that Newsom should not talk with any of the employees about his discharge on Company time; Kalins' withholding Webb's promotion for a short time to ascertain when "things were settled"; lack of disciplinary action against other Instruction Technicians.

These seem to be exceedingly flimsy remarks of employees upon which to base any kind of finding of fact or upon which there can be charged to the Company a violation of the law. As, for instance, the fact that no disciplinary action was taken against the other Technicians, which is evidence that union activity was not the cause of the discharge, as they were equally involved. Instead of being evidence against Respondent it is evidence in its favor. The other inferences, which the Trial Examiner claims "buttressed" his findings, are equaly unconvincing.

It will also be noted from a reading of the findings that some of the evidence actually referred to in the findings does not bear out the inference or finding of the Trial Examiner. As, for example, it is apparently insisted that a conversation between Hathaway and Noble, his superior, shows the Company attitude and determination to discipline Newsom. That conversation is set out in the findings (R. 28) and a fair inference from that conversation would justify exactly the opposite finding; that is, that Mr. Noble left the judgment up to the department as to whether or not Newsom was a satisfactory employee.

The second finding referred to in the "Concluding Findings", and which is the only other finding quoted as "buttressing" the Concluding Findings, is the finding (R. 30) that Warden's statement to the Technicians on January 16, 1951 was imputable to the Respondent and supported the findings and order. This statement has already been referred to and the authorities cited have established that such a remark is not attributable or binding upon the Respondent. It must therefore be ignored. Thus, the main prop to the findings is destroyed.

The findings have been carefully analyzed by counsel for Respondent in his objections to Trial Examiner's Report. There counsel pointed out in what respects each finding and inference was unsupported by substantial evidence. The attention of this Court is directed to "Statement of Exception to Intermediate Report and Recommended Order" found on pages 37 to 81 of Transcript of Record. The references in the Exceptions are to pages in the original reporter's transcript, but have been checked and are correct and accurate.

XIV.

THE PETITIONER IS BOUND BY THE ORDINARY RULES OF LAW IN THE CONDUCT OF HEARING

There is no doubt but that the Trial Examiner and the Board are bound by the ordinary rules of evidence and of law in their conduct of the hearing. That is, the Trial Examiner must concede that the burden of proof in this case was upon the general counsel and Newsom and he should require them to assume that burden and, if they have not, he should find in favor of the Respondent. The record discloses that he completely ignored these rules of law. Furthermore, he has in his findings relied on conclusions drawn by witnesses as to the meaning of the statement of Warden as a fact "buttressing" his finding. Of course, the conclusion of a witness is not evidence as to what was said or meant by another witness.

The emphasis placed upon the statement of Warden also shows that the Trial Examiner completely ignored the rule of law that a statement from such an employee is not binding upon the employer. It is a very familiar rule that the findings of the Trial Examiner must be based upon a preponderance of the evidence. This rule is stated in the Act itself. Section 10(b) of the Act has the following final paragraph:

> "Any such proceeding shall so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopt-

ed by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

The second sentence of Subsection (c) of Section 10 of the Act contains this provision:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practices, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order . . . ."

This is a clear direction that the Board can only act upon a preponderance of the testimony.

XV.

TESTIMONY ESTABLISHING REASONS FOR THE DISCHARGING OF NEWSOM

Counsel realizes that this brief has already been extended at great length. The question involved, however, is important, not only to the Respondent herein, but to the public at large, as it involves the proper operation and maintenance of a very large public utility. Respondent has repeatedly contended that a great preponderance of evidence and all reasonable inferences to be drawn therefrom, establish beyond question that the discharge of Newsom was for good cause. This testimony can be readily found in the Transcript of Record.

Clearly, the employer is not required to give reasons for the discharge of an employee, nor is it required to prove that such discharge was for good cause or for any cause whatsoever. In this case, the employer is not required to justify the discharge of Newsom. The burden of proof is upon the petitioner. However, the employer produced convincing evidence at the hearing that the discharge of Newsom was on entirely different grounds than union activity.

In considering the reasons for the discharge, the history of the complaints against Newsom by his superiors must be considered. They must be taken as a whole and all together. They could be broken down, and each complaint might then seem weak, but, considered all together, they paint a very clear picture of the unsatisfactory work of this man. The evidence of

the inefficiency of Newsom is furnished by the Engineers and Station Chiefs who came into contact with him over a substantial period of time. In fact, it appears that everyone who had an opportunity to judge his work testified that his work was unsatisfactory. Two of the witnesses are now in the United States Navy, and are not now employed by the employer. The others are in the employ of the employer, but showed no prejudice at all against the employee. The unanimity of the opinion of the men in the best position to judge, is, in itself, a convincing fact justifying the discharge of Newsom. All of these men have denied that the discharge was influenced in any way by the union activity of Newsom.

In considering this testimony, it must be first remembered that the discharged employee was an Instrument Technician, who was charged with the duty of keeping the instruments in the great power plants in order. The power plants in question were Station B and the Silver Gate Plants in San Diego, and had a capacity of 160,000 kilowatts and 100,000 kilowatts, respectively, and supplied the City and County of San Diego with electricity. The responsibility of these men was very great and it was exceedingly important that the work of inspecting these instruments be done well and efficiently. No one can deny the right of employers, under these conditions, who have the responsibility of furnishing a great city with its electricity, to discipline its employees charged with the maintenance of the instruments on its powerful and tremendously expensive machines. Those charged with

the duty of maintaining the efficiency of these two great plants were in the best position to judge the qualifications of Newsom, and all testified that his work was unsatisfactory, and that he should be taken off the job. No one should dare to substitute their judgment for the judgment of these men. No one has attempted to dispute their testimony. No evidence produced indicates any lack of sincerity or ability on the part of these men, or any personal prejudice on their part against either Newsom or union activities, except the scintilla, if even that much, of evidence cited by the Examiner.

The person in the best position to judge the work of Newsom was his immediate superior, *Harold L. Warden,* Instrument Engineer. He first came to work for the Company in 1947 and was promoted to Instrument Engineer in March of 1949 (R. 189). He outlined the importance of the work of the Instrument Technicians, of which Newsom was one. (R. 191). He stated that the work was "of such a nature that errors, lack of accuracy, being lackadaisical, or, perhaps you might say, not caring too much, or not paying strict enough attention to the job, can be very detrimental in the matter of Station efficiency. It even could, under hazardous operation, cause plant damage or personal damage." (R. 191, 192). In his testimony, Mr. Warden further enlarged upon the importance of this work. (R. 192, 193). He further testified that Newsom's work was "spasmodic". At times he would do very satisfactory work, and at other times it was not satisfactory. The manner in which he performed his

work was not satisfactory to his superiors or to others. (R. 193, 194). Warden testified that he spoke with Newsom and explained the unsatisfactory nature of his work and reported his lack of efficiency to others from October of 1948, on. (R. 195, 196, 197, 198). He testified that the work of Newsom continued to be unsatisfactory and his inefficiency was discussed with Hardway, the Efficiency Engineer, (R. 197) and with Kalins, his successor. (R. 197). Warden and Kalins conferred with Newsom at a later date, in 1950, and informed him that unless his work became satisfactory and remained so, it would be necessary for him to leave the department. (R. 197, 198). He stated that upon occasions Newsom showed a disrespect to Warden, his superior. (R. 198, 199). Mr. Warden produced records, consisting of logs and reports, showing the inefficiency of Newsom. These will be discussed in another subdivision of this brief.

John T. Hardway, former Efficiency Engineer for the Company also testified as to the inefficiency of the work performed by Newsom. At the time of testifying, he had severed his connection with the Company and was a Lieutenant Commander in the United States Navy, stationed at the San Farncisco shipyard. He started his employment with the Company in June, 1946, as a Junior Engineer, and worked his way up to the position of Efficiency Engineer, to which position he was promoted in November of 1948. (R. 289, 290). He first observed the inefficient work of Newsom in June of 1950. (R. 291). There had been prior complaints, but on that date a meeting was held, at

which meeting Warden, Hardway and Newsom were all present. A friendly discussion was had and Newsom was warned to do better work. (R. 292, 293). Six weeks later there was another complaint, this time from Mr. Proutt, and an investigation was held, but nothing serious was brought to light. (R. 294). Campbell and Proutt complained again, and, together with Mr. Warden and Mr. Hardway, the matter was discussed and Newsom made excuses (R. 295). A system of rotation was established, and it was noticed that when Newsom was paired with another Technician, the work of both "fell down", and when the same Technician was separated from Newsom, that Technician's work improved. (R. 297). It was clearly the opinion of Mr. Hardway that the work of Newsom was unsatisfactory. (R. 298).

B. L. Stovall, formerly Efficiency Engineer for the Company, and at the present time a Lieutenant Commander in the United States Navy, stationed at the Industrial Command, U. S. Naval Station in San Diego, testified that he started to work for the Company in 1937 and gradually advanced through the grades, including some years of university training, until he became Efficiency Engineer in 1946. (R. 312). On his way up, he was Station Chief, Junior Engineer and Instrument Technician (R. 313). He had an opportunity to observe the work of Newsom and first came into contact with him in October of 1948 (R. 313). He heard complaints from the Operating Department to the effect that Newsom was doing inefficient work on the control instruments, and as to horseplay (R.

314, 315). Newsom showed a remarkable lack of initiative in attempting to grasp problems involved and was given to horseplay (R. 316). He found him to be temperamental and unsuited for the job with respect to Instrument Technician's work, and Stovall observed no improvement—"it was more or less pull and haul all the time." (R. 316). The job held by Newsom was one of the most important functions in the power house (R. 317). Stovall enlarged upon the matter of lack of confidence and inability to properly handle the controls. (R. 318).

Joseph L. Kalins was the Efficiency Engineer with the Company at the time of termination of Newsom's employment. He also advanced up through the grades with the Company and became Efficiency Engineer in September of 1950, succeeding Mr. Hardway (R. 323, 324). He testified that he first questioned Newsom's ability in May or June of 1950 (R. 325). He first discussed the matter with Newsom in September of 1950. (R. 327). After hearing several complaints from Warden, he went over the complaints with Newsom in the presence of Warden. Newsom excused every action about which there was a complaint, and became very angry. (R. 328). Later on, when Newsom was notified of termination or transfer, the witness Kalins definitely outlined to Newsom what grounds the complaints were based on (R. 335). These have been previously referred to.

Kalins testified that when these grounds were called to Newsom's attention, he wanted to put Warden

on the carpet before the men. (R. 335, 336). At this meeting, Newsom had a monopoly of the floor, and cited many childish reasons why Warden did not like him, and also excused himself by indulging in criticisms of Warden, according to the testimony of Kalins. (R. 336, 337). Mr. Kalins also testified that there had been a great improvement in the work of the department since Newsom left. As Kalins expressed it, "the department as a whole was more capable, more hard-working, more harmonious, and all around a much better department. (R. 339). Mr. Kalins attributed the improved condition of the department to the fact that Newsom had left.

Charles L. Hathaway is the Superintendent of Electric Production, and testified that he had been with the Company for 10 and one-half years, starting as Efficiency Engineer. He testified that he had had a great deal of experience prior thereto and this is fully outlined in his testimony (R. 359, 360). He testified that the first complaint he received about Newsom was early in 1950 from Mr. Campbell, Station Chief at Station B, which complaint was to the effect that the operating personnel were losing faith in the accuracy of the meters and of the inspection by Newsom (R. 360). Hathaway decided that it was best to separate Newsom and the other men, and the rotation program was then carried out. (R. 360). The inefficiency of Newsom was discussed also with Hardway (R. 361). Zitlaw, Station Chief at Silver Gate, informed the witness that he had had several complaints about the work done by Newsom, which was referred

to Mr. Kalins (R. 361). Later, Zitlaw also complained of the inefficient work of Newsom, which was also referred to Kalins. Kalins and Warden informed the witness that Newsom had given trouble in every combination that had been arranged, and there was much discussion among the three with respect to Newsom. (R. 363). Mr. Hathaway further testified in detail to the meetings heretofore referred to, and it was his opinion that the supervisors leaned over backwards to give Newsom a chance and showed no prejudice whatsoever against him. He relied quite strongly upon the criticism of Newsom given by Zitlaw and Campbell (R. 375). Mr. Hathaway testified to the requirements of the job and the necessity for harmony and cooperation. (R. 373). The meetings of January 15th with the men and January 30th with the Station Chiefs and Supervisory Engineers have already been detailed.

Kenneth Campbell, Station Chief at Station B, outlined rather extensively similar work prior to his employment by the Company. (R. 380, 381). He testified that prior to May, 1950, he received repeated complaints from men under him as to the work of Newsom (R. 383); that the work of Newsom continued to be unsatisfactory (R. 384); that after May of 1950 he noticed a sort of inactivity on the part of Newsom; that he seemed to have no definite objective ahead, and indulged in considerable horseplay (R. 384).

Walter S. Zitlaw testified that he was Station Chief at Silver Gate; that he started with the Company in 1941; that he had been Station Chief at Silver Gate

Station since 1943; that prior to his employment by the Company he had held a similar position with the Phelps Dodge Company. (R. 396). He testified that he noticed that the work of Newsom had become lax and was subject to other criticisms. He first recalled Newsom in 1949, at which time he made a favorable impression. But as time passed, he became lax in his duties and Zitlaw received numerous complaints concerning Newsom from operators and even from maintenance forces as to his lack of attention to duties (R. 397); that the work of Newsom continued bad and the witness received many complaints about him (R. 398); that he noticed that very little work was executed by Newsom and that work assigned to him was not being completed. (R. 399). The witness called the attention of Hathaway to the situation and stated that Newsom's work was lagging behind, and he further called it to Mr. Warden's attention, but that he, Zitlaw, found no improvement in the situation. (R. 400). He gave his general opinion of the work of Newsom in the following language: "He has exceptional ability, when the work is to his interest; if he finds interest in the work, he can do a good job and can do it with dispatch. The work we have is not the type of work that will hold his interest over any period of time, and he doesn't fit that picture at all. . . . I suppose it is his temperament and attitude toward the job. He doesn't seem to accept the job for what it is. . . . Because of the failure to continue to prosecute each assignment that was his, each responsibility that was his, he would let them go by for lesser things, or for just laughs, doing

nothing." (R. 400, 401). The witness also noted that Newsom spent more time in his office than he should have; that he was guilty of other inefficient work than described above (R. 401).

All of the above witnesses testified emphatically that Newsom's union activities did not in any way affect them in their opinion of his work, nor did it affect their decision as to his termination.

XVI.

ASSISTANCE GIVEN BY SUPERIORS TO FURTHER UNION APPLICATION

It is admitted by all of the witnesses, including Newsom himself, that his superior officers in one way or another offered to and did give him and his associates considerable help in their efforts to obtain union recognition. This is certain proof that the superior officers did not entertain any prejudices against him, nor did they discriminate against him because of his union activities.

In the first conversation, Warden agreed that it was a good thing for them to join the union (R. 107). He offered to help them and did obtain a job classification sheet for them (R. 188, 288). Mr. Warden testified that he told the men that he would assist them in any manner that he could (R. 188, 202). He also testified that Mr. Hathaway stated that he would work with the men, through Warden, in any manner that he could, such as supplying them with information that

might be necessary to prepare a complete and satisfactory demand or request (R. 202).

Shroble testified to Warden's offers to help (R. 169), and Fowler testified to Warden's actual assistance in furnishing the job classification sheet (R. 188). This classification sheet was furnished and is in evidence as Employer's Exhibit 1. The evidence is clear that all of the immediate superiors of these men offered to help and stood ready and willing to help, and to furnish all of the information necessary, and none of them put any obstruction in the way of union activities. All of them also testified that the union activities of the men played no part in the dismissal. The fact also remains that the other men are still in the employ of the Company and are doing satisfactory work, except Botwinis who voluntarily left the Company for other employment.

It is also evident that the employees of the employer are well organized and the employer deals with the union all of the time. The record of the employer therefore does not indicate that it had any prejudice or is apt to discriminate against these men or their union activity.

If the Trial Examiner had approached his decision in a fair-minded attitude toward the employer, he would have inferred from this testimony that the Company woud not use any pressure to prevent these employees from joining the union and, in fact, would help them do so.

XVII.

NEWSOM'S ATTITUDE TOWARDS SUPERIORS WAS SUFFICIENT CAUSE FOR DISCHARGE

The reading of the testimony in the record would disclose to an impartial mind that Newsom's attitude against Warden and his superior officers was that of a quarrelsome, uncooperative, and opinionated employee who believed that he knew more about the job than his superior officers and that he was bound to put his superiors in as bad a light as possible. (R. 217-217, 284). According to Newsom's own admission, he stated at one time that he was going to pursue this matter "if only for its nuisance value." (R. 154). This is further testified to by Warden (R. 218) and Kalins (R. 387). This is a further indication that the attitude of Newsom was highly improper and this was testified to by his superiors.

XVIII.

RECORD OF INEFFICIENCY ON LOGS

Respondent presented before the Trial Examiner some logs and records kept by Newsom, showing his inefficiency and errors and mistakes. Trial Examiner has attempted to make it appear in his findings that this was the only evidence presented of the inefficiency of Newsom, and that this evidence was discovered after his termination. This evidence is only cumulative and is another reason why he should have been terminated, and it can be considered as showing the inefficiency of Newsom, even though it was only discovered after his discharge. It is true that the discharge is based upon other evidence of inefficiency, and this later discovered record only confirms the decision.

The Respondent offered in evidence reports on tests on Unit Turbines Nos. 1, 2 and 3 at Silver Gate, and combustion checks made on Boilers 3, 4 and 5. These are contained in Respondent's Exhibit 2, and are attached to the Transcript of Record beginning at Page 441. These records were described and explained by Mr. Warden in his testimony beginning at R-223, and continued during his direct examination through Transcript of Record, Page 241. On Page 444 of the Transcript of Record is a photostatic copy of Page 2 of a two-page record made during the boiler tests. In this case, Newsom disregarded all that portion of the test which has been circled. This data is of considerable importance, as boiler performance and operation

is studied, particularly in cases of future problems where it becomes necessary to determine fully such phases of past performance. Had Newsom properly performed the test, then he would have been compelled to make known each burner setting and see that it corresponded to a rating under which the boiler was operating. Accordingly, he should have recorded his readings. The condition of this report raises a question as to whether or not the burners had been properly adjusted. This is all expressed in the testimony of Warden (R. 226).

At Page 445 of the Transcript of Record is a photostat of another boiler test. This, again, illustrates the negligence, carelessness and refusal to carry out instructions on the part of Newsom. The readings circled in the left hand side of the sheet, show that the excess air in this boiler was running at 12 to 13%. The instructions were that the excess air should be set at 19%, plus or minus 2%. In total disregard of such instructions, Newsom ran the entire test with low excess air and made no attempt to correct it. (R. 208).

The area circled on the right hand side of the sheet (R. 445) illustrates the carelessness and irresponsibility of Newsom in failing to record the burner position or the register setting. On this very same sheet he recorded the burner position and register setting for Boiler No. 3, and neglected to do so for Boiler No. 4. This illustrates the inconsistency in his work. (R. 208).

On Page 446 of the Transcript of Record, other errors appear on the part of Newsom. The errors themselves were not of a really serious nature. The hearing, however, was greatly confused by these errors in the technicalities involved and the constant and biased interruptions and questions of Examiner. (R. 229-232). At Page 448 of the Transcript of Record is a sheet showing errors similar to the above. Newsom was in error in the reading which he recorded for the steam flow. He recorded 515, whereas the reading would more accurately have been 520, as was pointed out by Warden in his testimony. Such an error, if carried through a turbine-generator performance, would result in a very erroneous set of data. The result would be a useless test, which would have to be done over (R. 234-236). Here, again, much confusion was generated at the hearing, with regard to the establishing of correct steam flow readings. The Trial Examiner, as appeared from the record, assumed the role of Prosecutor for a time, as he did in other instances, and challenged the accuracy of the reading "520".

At this point it should be again remembered that Newsom was an important part of a group whose work and record meant a great deal to the operation of the plant. This would be true both for current and future operation. Test data acquired today may be filed and not referred to for several months or years, at which time it becomes extremely important that the data be accurate and complete; otherwise, the entire value is lost.

It is conceded that the above is not of great weight, because of the fact that it was discovered after the termination of Newsom. Counsel for Respondent again insists, however, that it is a record made in Newsom's own handwriting, which proves that the statements made by the Supervising Engineers, upon which the termination was based, were true and correct and were not products of the imagination.

Both the Trial Examiner and counsel for the Board attempted to belittle this evidence and made a tremendous issue of it during the hearing and claimed that it proved that the employer had no real cause for terminating Newsom. It is argued by the Trial Examiner that this evidence is all the employer had to justify the termination, and that, therefore, it shows a lack of cause on the part of the employer. A reading of the Transcript of Record (R. 223, 258) will inform the Court as to these failures on the part of Newsom as well as to the unfair tactics of the Trial Examiner. There are also many other errors which were committed by Newsom, as shown on the logs and written reports. These will be noted by a reading of the testimony of Newsom and the Exhibits attached to the Transcript of Record. The testimony of Newsom as to these errors commences at about R-220.

Mr. Warden also testified to a very serious, deliberate fraud in the Record. In the early part of February, 1951, it was discovered by Warden that Newsom had signed the name "Webb". This was above a complete alarm check record. Warden confronted Newsom

with this and asked him about it and Newsom took out an eraser and said "I put that down just for laughs." (R. 220, 221). This, it will be noted, occurred before Newsom's termination.

XIX.

NEWSOM WAS NOT ACTUALLY DISCHARGED

The entire case rests upon the assumption that Newsom was discharged for union activity. As a matter of fact, he was not actually discharged. For the good of the Company, and the department, it was decided to assign him, or transfer him, to another department. Mr. Kalins told Newsom that "he could transfer to some other department by making the appropriate application with the Personnel Department, but that his termination, however, in any case, would be in two weeks, which would be February 14th. We told him that he could resign without prejudice, or, if he chose, he would be discharged." (R. 338). Newsom did not answer directly, but said that he would let them know on the following day, and he never again said anything about the transfer. (R. 338). Not having heard from him as to his choice in the matter, he was terminated on February 14th. (R. 338). According to the testimony of Kalins, Hathaway had stated that "it would be all right if Mr. Newsom transferred to some other department" and this was stated at the supervisor's meeting of January 30th. (R. 353). Therefore, strictly speaking, Mr. Newsom had the option of being transferred to another department. This he refused to take,

and so was discharged. There is no doubt at all but that the employer had the right to transfer Newsom to another department.

It is quite evident that the actual discharge was at the choice of Newsom. As a matter of fact, therefore, this entire case should fall, because of the lack of any evidence that the employment of Newsom was terminated. Certainly the above shows that the termination, if there was one, was not because of union activity, because he was offered a choice of remaining with the Company in another department thereof.

CONCLUSION

In conclusion Respondent earnestly prays this High Court to refuse to enforce the Order. The effect of an Order to enforce would be very far reaching and would greatly interfere with the right of this large Company to conduct its own business and to produce electricity for which it is held responsible by the people of this area and by other Boards and officials of this State.

This is a very unusual case as nowhere in the cases examined has Counsel found one where the evidence of discharge for Union activity is so weak, or the evidence of good cause for the discharge of the employee so strong.

Obviously neither the Trial Examiner or the Board placed any credence at all upon the testimony of trained engineers of the Respondent without any rea-

son or any conflict in the evidence or any reliance upon anything at all. The Trial Examiner merely refused to listen to them.

It is also clearly apparent that neither the Trial Examiner or the Board paid any attention to the law cited by Counsel for Respondent. Otherwise they would not have relied at all upon the statement allegedly made by Warden.

In view of the obvious weakness of the supporting evidence cited by the Trial Examiner and the Counsel for Petitioner, and the rules of law above cited, this Respondent has a right to ask, and this Court should review, the evidence found in the Transcript of Record.

It is submitted finally that the Order of the Board is not supported by *substantial* evidence and the Petition should be denied.

Respectfully submitted,

LUCE, FORWARD, KUNZEL & SCRIPPS
By EDGAR A. LUCE
Attorneys for Respondent.

No. 13526

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MIGUEL GONZALEZ-MARTINEZ,

Appellant,

vs.

H. R. LANDON, Los Angeles Director, Immigration and Naturalization Service, and U. L. PRESS, Officer in Charge in San Diego, Immigration and Naturalization Service,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEES.

WALTER S. BINNS,
United States Attorney,
CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division,
ARLINE MARTIN,
Assistant U. S. Attorney,
312 North Spring Street,
Los Angeles 12, California,
Attorneys for Appellees.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 13526

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MIGUEL GONZALEZ-MARTINEZ,

Appellant,

vs.

H. R. LANDON, Los Angeles Director, Immigration and Naturalization Service, and U. L. PRESS, Officer in Charge in San Diego, Immigration and Naturalization Service,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEES.

Jurisdiction.

The District Court has jurisdiction of appellant's Petition for a Writ of Habeas Corpus [T. R. 2] pursuant to the provisions of Title 28, U. S. C. 2241, and of the appellees who appeared and filed their Return to Petition for Writ of Habeas Corpus [T. R. 7] in response to the District Court's Order Granting Writ of Habeas Corpus [T. R. 5].

This Court has jurisdiction of this appeal from the District Court's Order Dismissing Petition for Writ of

Habeas Corpus [T. R. 19] (which Order should discharge the Writ previously issued) [T. R. 5], pursuant to the provisions of Title 28, U. S. C. 2253.

Statutes Involved.

The Act of February 5, 1917, as amended December 8, 1942, (8 U. S. C. 155) contains several provisions which are pertinent to this case, as follows:

"§*155. Deportation of Undesirable Aliens Generally.*

155(a) * * * Any alien who * * * admits the commission, prior to entry, of * * * a crime * * * involving moral turpitude; * * * shall, upon warrant of the Attorney General, be taken into custody and deported * * *

155(c) In any case of an alien (other than one to whom subsection (d) is applicable) who is deportable * * * and who has *proved good moral character* for the preceding five years, the Attorney General *may* * * *

(1) Permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or

(2) Suspend deportation of such alien * * *" (Emphasis supplied.)

"155(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under * * *

(4) Any of the provisions of subsection (a) of this Section * * *"

The Act of May 26, 1924 (8 U. S. C. 213) reads as follows:

> "§213. *Compliance with immigration requirements; persons ineligible to citizenship; penalties.*
>
> (a) *Persons not to be admitted.* No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; * * *"

Section 2 of the Act of March 4, 1929 (8 U. S. C. 180a) reads as follows:

> "§180a. *Entry of alien at improper time or place; eluding examination or inspection; misrepresentation and concealment of facts; penalty.*
>
> Any alien who after March 4, 1929, enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor * * *."

Section 1(a) of the Act of March 4, 1929, as amended June 14, 1940 (8 U. S. C. 180(a)), reads as follows:

> "§180. *Reentry or attempted reentry of deported alien; penalty; deported seamen as entitled to landing privileges.*
>
> (a) If any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after March 4, 1929, * * *."

Statement of the Case.

The principal issue in this action is whether the alien is entitled to have the Attorney General exercise his discretion pursuant to 8 U. S. C. 155(c), when it appears from the record that appellant is not eligible for suspension for two reasons: (1) Because he has not proved good moral character for five years preceding September 10, 1951, the date appellant applied for suspension of deportation, and (2) Because he has committed a crime involving moral turpitude, either of which facts disqualify appellant for discretionary relief.

This latter question is raised in Point III of appellant's Argument (App. Br. 4) where appellant argues the Court erred in holding the Attorney General "was not bound to exercise his discretion" [T. R. 19].

Points I and II of appellant's Argument (App. Br. 4) claim error because the lower court did not decide the question of whether or not bigamy is a crime involving moral turpitude, whereas it is appellees' contention that since appellant was ineligible for suspension on other grounds, it was unnecessary for the Court to decide that issue; however, there is no reason why this Court cannot decide that question on this appeal.

We do not think Point II of appellant's Argument (App. Br. 4) raises an issue in this case. Appellees raise no question of jurisdiction of the District Court to entertain appellant's Application for Writ of Habeas Corpus or to review the record of the deportation proceedings before the Immigration and Naturalization Service, in the District Court proceeding.

Summary of Argument.

I.

BRIEF STATEMENT OF FACTS.

II.

THE ALIEN IS NOT ENTITLED TO HAVE THE ATTORNEY GENERAL EXERCISE HIS DISCRETION REGARDING SUSPENSION OF DEPORTATION UNDER 8 U. S. C. 155(c) BECAUSE (1) HE HAS NOT PROVED GOOD MORAL CHARACTER FOR FIVE YEARS PRECEDING SEPTEMBER 10, 1951, AND (2) BECAUSE SECTION 155(c) DOES NOT APPLY TO THIS ALIEN BECAUSE HE IS DEPORTABLE AS AN IMMORAL PERSON, TO-WIT: A PERSON WHO HAS COMMITTED BIGAMY, A CRIME INVOLVING MORAL TURPITUDE PURSUANT TO SECTION 155(d).

III.

BIGAMY IS A CRIME INVOLVING MORAL TURPITUDE.

ARGUMENT.

I.

Brief Statement of Facts.

A short chronology of the facts which are not disputed by the pleadings and which are supported by the record, segregated as to the (1) facts relating to appellant's marriages, (2) the facts relating to the Immigration proceedings, and (3) the Court proceedings, are as follows:

Marriages.

August	29, 1939	Petitioner married to Maria Rita Dominguez in Mexico.
	1944	Petitioner claims to have paid an attorney to start proceedings for divorce but admits he knew that no action was taken [Ex. A in evidence, Hearing July 20, 1951, pp. 7, 8 and 9].
November	21, 1945	Petitioner married to Enriqueta Mestis in the United States.
March	16, 1950	Petitioner divorces wife No. 1, Maria Rita Dominguez.
May	22, 1950	Petitioner remarries wife No. 2, Enriqueta Mestis.

Entries Into United States and Immigration Proceedings.

May	7, 1947	Petitioner illegally reenters near San Ysidro, and in Criminal Proceeding 10934, sentence of a year and a day suspended and 5 years' probation given [T. R. 8].
June	9, 1947	Petitioner deported via San Ysidro [T. R. 8].

January 1951	Petitioner illegally reenters United States near San Ysidro [T. R. 8].
July 12 and 20, 1951	Deportation hearings held at San Diego [T. R. 8].
July 26, 1951	Hearing Officer determines petitioner deportable.
September 10, 1951	Application for suspension of deportation denied, and Order of Deportation affirmed [T. R. 9].
December 7, 1951	Appeal dismissed by Board of Immigration Appeals [T. R. 9].
January 14, 1952	Warrant of Deportation issued [T. R. 15], reciting four grounds for deportation.

Court Proceedings.

May 26, 1952	Petition for Writ of Habeas Corpus filed.
May 28, 1952	Court signs Order Granting Writ.
June 12, 1952	Appellees' Return to Writ of Habeas Corpus filed.
June 16, 1952	Stipulation and Order Admitting in Evidence as Exhibit A certified copies of July 12, and July 20, 1952, Immigration and Naturalization Hearings and case submitted upon written Memorandum of Points and Authorities.
July 23, 1952	Order Dismissing Writ of Habeas Corpus by District Court.

II.

The Alien Is Not Entitled to Have the Attorney General Exercise His Discretion Regarding Suspension of Deportation Under 8 U. S. C. 155(c) Because (1) He Has Not Proved Good Moral Character for Five Years Preceding September 10, 1951, and (2) Because Section 155(c) Does Not Apply to This Alien Because He Is Deportable as an Immoral Person to-wit: A Person Who Has Committed Bigamy, a Crime Involving Moral Turpitude Pursuant to Section 155(d).

The grounds for deportation of appellant, as recited in the Warrant of Deportation issued January 14, 1952 [T. R. 15] are four: (1) At time of entry in January, 1951, appellant was not in possession of a valid immigration visa and not exempted from presentation thereof; (2) He entered without inspection; (3) He was an alien previously arrested and deported and had not been granted permission to reapply for admission, and (4) He admits commission of a crime involving moral turpitude, to-wit bigamy.

The provisions of Section 155(c) regarding discretion to suspend deportation are inapplicable to a person who is deportable for admission of a crime involving moral turpitude (see Sec. 155(a) and (d) *supra*) or who fails to prove good moral character for the preceding five years. Appellant admits the facts as outlined in the Statement of Facts above, and that his second marriage was bigamous. That bigamy is a crime involving moral turpitude is discussed under Point III.

It appears from the facts that petitioner was living in a bigamous state up until March 16, 1950, less than five years prior to the proceeding to deport, and those facts alone are sufficient upon which to base a finding that he failed to prove good moral character under the provisions of Section 155(c). The record also shows that since petitioner's second marriage in 1945, he has failed to support the three children of his first marriage [Ex. A in Evidence], which fact also supports a finding of lack of good moral character during the preceding five years. In addition, there is the 1947 sentence under Criminal Case No. 10934 of a year and a day suspended and five years probation to further sustain a finding of failure to prove good moral character during the preceding five years. It therefore appears that petitioner is not entitled to the exercise of discretion to suspend his deportation.

The power of suspending deportation is a discretionary one, and *not* a matter of right.

> *United States ex rel. Weddeke v. Watkins,* 166 F. 2d 369, C. C. A. 2, cert. den. 68, Sup. Ct. 904 (1948).

The Courts cannot review the exercise of discretion. They can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion.

> *United States v. Shaughnessy,* 183 F. 2d 271.

Petitioner is not entitled to a *de novo* hearing on habeas corpus but is limited to a review of the record.

> *Kessler v. Strecker,* 307 U. S. 22, 34.

III.

Bigamy Is a Crime Involving Moral Turpitude.

While it is necessary that the facts admitted by petitioner constitute a "crime involving moral turpitude" before it can be said that he thereby loses the right to the exercise of discretion to suspend deportation, it is not true that the elements of the crime of bigamy as prescribed by the statutes of the State of California are the applicable elements which determine whether or not the crime involves moral turpitude. The standard by which we judge whether or not the "crime" involves moral turpitude is determined by the Immigration and Naturalization Regulations and not by the State Law defining the crime, and it has been so held by both the Immigration and Naturalization Service and sustained by the Courts. However, in the *Matter of E.*, 2 I & N Dec. 328 (A. G. 1945), it was held by the Attorney General that bigamy is a crime involving moral turpitude in Immigration cases despite the fact that the bigamy involved took place in the State of Nevada where the statute was sufficiently broad to include cases of marriage contracted in the honest belief that a prior marriage had been legally terminated.

This latter view is sustained in the case of *Whitty v. Weedin,* 68 F. 2d 127 (C. C. A. 9), in which it is said:

> "[4] Upon the other question presented as to whether or not the crime of bigamy, admitted to have been committed by appellant in Canada before coming to this country, and for which he served a term of imprisonment, was such a crime as involved moral turpitude, the cases cited by appellant, claiming to indicate that under certain conditions a crime of bigamy might not involve moral turpitude, do not

support his position. The crime of bigamy involved moral turpitude.

'It is the conduct of the defendant in marrying the second time which constitutes the crime and it is the abuse of this formal and solemn contract which the law forbids because of its outrage on public decency.' (3 R. C. L. 804.)

By the law of Canada bigamy is declared a crime and its serious nature is revealed by the provision for punishment attached to conviction by imprisonment in the penitentiary for a term of seven years. It is no less a crime in this country, as was well said by Mr. Justice Field:

'Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States. * * * They tend to destroy the purity of marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment.' *Davis v. Beason,* 133 U. S. 333, 341, 10 S. Ct. 299, 300, 33 L. Ed. 637.

The order under review is affirmed."

In *Mercer v. Lence,* 96 F. 2d 122, cert. den. 305 U. S. 611, a deportation order was sustained based upon conviction, in Canada, of the crime of conspiracy to defraud. The alien contended that statutes of Canada must be resorted to in order to determine whether such crime involves moral turpitude but the Court of Appeals for the Tenth Circuit held that "Moral turpitude referred to in said Section 155 of 8 U. S. C. A., as herein, must be determined according to our standard."

In *Jordan v. De George,* 341 U. S. 223, the Supreme Court disagreed with the Circuit Court view that "crimes involving moral turpitude were intended to include only crimes of violence or crimes which are commonly thought of as involving baseness, vileness or depravity." The Supreme Court held that the phrase embraces fraudulent conduct, such as defrauding the government of a tax on liquor.

Respectfully submitted,

WALTER S. BINNS,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,

Attorneys for Appellees.

No. 13536

United States
Court of Appeals
for the Ninth Circuit.

SABLE HALL,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

Appeal from the Supreme Court for the Territory of Hawaii

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-21-52

No. 13536

United States
Court of Appeals
for the Ninth Circuit.

SABLE HALL,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

Appeal from the Supreme Court for the Territory of Hawaii

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-21-52

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

J. DONOVAN FLINT, Esq.,
95 Merchant Street,
Honolulu, Hawaii,

Attorney for Plaintiff in Error.

ALLEN R. HAWKINS, Esq.,
Public Prosecutor, and

ROBERT E. ST. SURE, Esq.,
Ass't Public Prosecutor,
City Hall,
Honolulu, Hawaii,

Attorneys for Defendant in Error.

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

January Term, 1949

LARCENY IN THE FIRST DEGREE

THE TERRITORY OF HAWAII,

vs.

SABLE HALL,

Defendant.

INDICTMENT

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that Sable Hall at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 14th day of April, 1949, did unlawfully and feloniously take and carry away certain things of marketable, salable, assignable and available value, to wit, certain moneys in the sum of and of the value of One Hundred and Sixty-three Dollars ($163.00) lawful money of the United States of America, a more particular description of which is to the Grand Jury unknown, of the moneys and property of Boyce Plyler, the owner thereof and entitled thereto, with intent in her, the said Sable Hall, to deprive the owner aforesaid of the moneys and property aforesaid, and did then and there and thereby commit the crime of larceny in the first degree, [3*] contrary to the form of the statute in such case made and provided.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

A true bill found this 25th day of April, A.D. 1949.

PIERRE L. Le BOURDAIS,
Foreman of the Grand Jury.

JOHN R. DESHA,
Assistant Public Prosecutor of the City and County of Honolulu.

Certified true copy.

[Title District Court and Cause.]

VERDICT

We the Jury, in the above-entitled cause, find the defendant guilty as charged.

/s/ JOHN T. POPE,
Foreman.

Honolulu, T.H., August 17, 1949.

[Endorsed]: Filed August 17, 1949.

In the Supreme Court of the Territory of Hawaii
October Term, 1951

C 21118

TERRITORY OF HAWAII,

vs.

SABLE HALL.

No. 2786

Error to Circuit Court First Circuit

Hon. J. E. Parks, Judge.
Argued May 1, 1952.
Decided May 14, 1952.
Towse, C. J., Le Baron and Stainback, J.

Criminal Law—right of trial judge to question witness.

A trial judge has the right to question a witness to elicit facts or clarify evidence so long as this is done in a fair and impartial way and is necessary to bring out facts essential to a just verdict. In this regard he has a wide latitude and discretion. The exercise of his discretion will not be reviewed on appeal except in cases of abuse thereof.

Same—larceny—corpus delicti—proof of by circumstantial evidence.

Corpus delicti may be proved by circumstantial evidence provided such evidence is sufficiently clear to exclude any reasonable hypothesis of innocence.

Same—same—same.

It is not essential that the corpus delicti should be established by evidence independent of that which tends to connect the defendant with the perpetration of the crime. The same evidence which tends to prove the one may also prove the other so that the corpus delicti and the guilt of the defendant may stand together inseparably on one foundation of circumstantial evidence. [7]

OPINION OF THE COURT

By Stainback, J.

The defendant was indicted for the crime of larceny in the first degree, to wit, that she did take $163, the property of one Boyce Plyler. Defendant was convicted before a jury and sentenced to ten years in prison.

On April 13, 1949, Plyler and another sailor in the United States Navy arrived in Honolulu and registered at a hotel; at that time Plyler had $170 in eight $20 bills in his wallet in his pocket and $10 in his front shirt pocket. Subsequently the sailors went to a chop suey place on Hotel street and Plyler spent a portion of the $10 he had in his shirt pocket. After the sailors left the chop suey place and walked down the street, Plyler was stopped by the defendant who asked him if he wanted a woman; this was about 2:00 o'clock a.m. Defendant grabbed his arm and started to play with his privates; one of the defendant's hands was inside his trousers and the other in his left front trouser pocket. She told

Plyler to go down the street and she would follow. As Plyler walked down the street he noticed that defendant walked the other way with another couple. Becoming suspicious, he reached for his wallet and found it empty. He and his companion then ran down the alley, caught the defendant and asked her to give him back his money. A scuffle ensued and Officer Guigni ran over, took the persons into custody and brought them to Beretania street where Officer Schwartzman was on duty. The two officers and the victim then noticed that the defendant had a bulge in her mouth; when asked what she had in her mouth she did not answer but bent over and removed something green therefrom. He asked her to open her [8] hand and he recovered $163 from the defendant's hand, consisting of eight $20 bills and three $1 bills. Defendant was taken to the police station and charged with larceny in the first degree.

The first assignment of error is that the court committed error in questioning the prosecution's witness, Boyce Plyler, after both counsel had finished their questions of this witness.

After Plyler had finished testifying the court asked a few questions as to the location and content of his wallet before he met the defendant and asked him to show the jurors where the defendant's hands were when she "felt him up." The witness demonstrated that one of the defendant's hands was inside his trousers and the other in his left front pocket, and that he had put his wallet in his left front pocket. The examination was brief and to the point and, so far as is shown by the record, there was no

unfairness in the judge's attitude or in the form of his questions.

The general rule is that a trial judge has the right to question a witness to elicit facts or clarify evidence as long as this is done in a fair and impartial way and is necessary to bring out the truth and facts essential to a just verdict.

In Beal vs. State, 138 Ala. 94, 35 So. 58, the court in discussing this question said: "It is always permissible for the Court, and its duty, to propound to witnesses such questions as it is deemed necessary to elicit any relevant and material evidence, without regard to its effect—whether beneficial or prejudicial to the one party or the other. The [9] development and establishment of the truth is its province and duty."

In Dutton vs. Territory, 13 Ariz. 7, 108 Pac. 224, the court in considering a case where the trial judge had participated in extensive interrogation of the witnesses, said: "It was not only the right, but the duty of a trial judge to question witnesses to bring out material points not made clear by counsel * * *." It stated further: "In this regard he has wide latitude and discretion, the exercise of which discretion will not be reviewed on appeal except in case of abuse thereof."

Hargrove vs. United States, 25 F. (2d) 258, goes very far indeed in permitting the trial judge not only to ask questions but to comment on certain phases of the case where the questions were intended to bring out the full facts to the jury.

Territory vs. Kekipi, 24 Haw. 500, held that a

trial judge's questions were justifiable to throw light on obscure testimony where he did not intimate an opinion on the facts in so doing.

There are literally hundreds of other cases to the same effect.

It is obvious that in the instant case the trial judge did not show any bias or intimate his opinion as to the guilt or innocence of the defendant in his questions.

The case of Territory vs. Van Culin, 36 Haw. 153, relied upon by defendant, bears little or no resemblance to the case at bar. In that case the court interrupted counsel on many occasions, asking argumentative questions and showed he was [10] prejudiced against the cause of the defendant and, as the court said: "The examination of the defendant by the trial judge is too extensive to permit its transcription here. However, on every occasion when the trial judge took over the defendant as a witness, it is clear from the record that the court's examination was an interruption of the orderly development of the case by counsel. * * * In the course of these interruptive examinations, some of the questions were improper and may be characterized as argumentive. It is stated by counsel for the defendant, and not denied by the appellee, that the trial judge exhibited an unfriendly attitude towards the defendant * * *."

As he pointed out, the examination of the witness in the present case was by questions propounded by the judge after both parties had finished the examination of the witness and showed no prejudice

and were asked to clear up and illustrate certain points not too clearly brought out in the testimony.

The other ground of alleged error was stated in several forms; these errors claimed by the defendant may be briefly stated: that the prosecution was not entitled to introduce evidence of possession by the defendant of goods alleged to have been stolen until the corpus delicti had been proved; that until the Territory had made out a prima facie case of larceny, which was for the determination of the court, evidence tending to connect the defendant with the commission of the crime was not admissible.

There is not much dispute that evidence of mere possession of stolen property cannot be admitted against the defendant without a showing of the corpus delicti, namely, that such property was [11] stolen.

This court, in the recent burglary case of Territory vs. Makaena, 39 Haw. 270, held that the rule that unexplained possession of stolen property was prima facie evidence of guilt does not become operative until it is shown by competent evidence that the property had been stolen. This court also set out in that case that the corpus delicti need not be proved by direct and positive evidence but may be proved by circumstantial evidence.

In the instant case there is ample circumstantial evidence to make out a prima facie case of the corpus delicti. We need not review this evidence in detail as sufficient facts have been set out supra. To repeat some of the evidence: the testimony that the complaining witness had eight $20 bills in his wallet

in his left hand pocket and the change from $10 after he and his friend had eaten chop suey; that the defendant had her hand in his left pocket and inside his trousers for some five or ten minutes; that after she told him to go down the alley, that she would follow him, he saw her going in the other direction; he felt in his pocket, found his money missing, chased and caught the defendant; that police officers came up and recovered from the defendant eight $20 bills and three $1 bills which she had in her mouth. This is sufficient to make a prima facie case of larceny.

Woods vs. People, 142 P. (2d) 386 (Colo.), was a case where the facts to establish the corpus delicti were somewhat similar to the instant case. The evidence was that immediately before the prosecution's witness discovered the loss of his wallet containing a specific number of described bills and stamps, he had seen defendant standing behind him; that the bills and [12] stamps were found in defendant's possession immediately thereafter; this evidence presented a case for the jury and justified conviction of larceny from the person. The court said that the corpus delicti may be proved by circumstantial evidence provided such circumstantial evidence is sufficiently clear to exclude any reasonable hypothesis of innocence.

In this case, as in many cases, the evidence offered to prove corpus delicti tends also to show the guilt of the accused. The authorities are clear that it is not essential that the corpus delicti should be established by evidence independent of that which tends

to connect the defendant with the perpetration of the crime; the same evidence which tends to prove one may also prove the other, so that the corpus delicti and the guilt of the defendant may stand together inseparably on one foundation of circumstantial evidence. (32 Am. Jur. 1046, 1047, and cases and annotations cited in note 19 on page 1047.)

The cases cited by the defendant, the one upon which he mainly relied being Sanders vs. State of Alabama, 52 So. 417, are readily distinguishable. The only evidence of the corpus delicti in the Sanders case was that certain goods either at one time forming part of the stock in trade of a merchant or goods like them were found in the possession of the accused without anything to show that they were stolen or were not sold in the due course of trade by some employee of the establishment (of which there were eight engaged in selling goods.)

Judgment affirmed.

/s/ EDWARD A. TOWSER,

/s/ LOUIS LE BARON,

/s/ INGRAM M. STAINBACK,
Judges.

[Endorsed]: Filed May 15, 1952.

Certified true copy. [13]

[Title of Supreme Court and Cause.]

JUDGMENT ON WRIT OF ERROR

Pursuant to the opinion of the Supreme Court of the Territory of Hawaii rendered and filed on May 14, 1952, in the above-entitled cause, the judgment of the lower court is affirmed.

Dated Honolulu, Hawaii, June 2, 1952.

By the Court:

[Seal] /s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ INGRAM M. STAINBACK,
Associate Justice.

Certified true copy.

[Endorsed]: Filed June 2, 1952. [15]

[Title of Supreme Court and Cause.]

NOTICE OF APPEAL TO NINTH CIRCUIT COURT OF APPEALS

1. Appellant: Sable Hall.

2. Attorney: J. Donovan Flint, 95 Merchant Street, Honolulu, Hawaii.

3. Offense: Larceny.

4. Upon verdict of a jury, appellant was adjudged guilty and sentenced, which judgment was affirmed by the Supreme Court of the Territory of

Hawaii on June 2, 1952, from which judgment this appeal is prosecuted.

5. Appellant is on bail, the amount and the sufficiency of the surety being duly approved.

6. The appellant has been deprived of her rights under the Constitution to a fair and impartial trial; to be protected against double jeopardy; to the due process of law; to be informed of the nature of charges against her; not to be held to answer except by indictment, and to the equal protection of the laws.

Dated at Honolulu, Territory of Hawaii, this 12th day of June, 1952.

SABLE HALL,
Plaintiff in Error.

By /s/ J. DONOVAN FLINT,
Her Attorney.

Certified true copy.

[Endorsed]: Filed June 12, 1952. [17]

[Title of Supreme Court and Cause.]

PETITION FOR APPEAL

To: The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the Territory of Hawaii:

Comes now Sable Hall, plaintiff in error herein, and deeming herself aggrieved by the Judgment of the Supreme Court of the Territory of Hawaii

made and entered on the 2nd day of June, 1952, pursuant to the opinion and decision of said Court made and entered on the 14th day of May, 1952, prays that an appeal may be allowed from said Judgment to the United States Circuit Court of Appeals for the Ninth Circuit; that an order be made fixing the amount of costs bond; that a duly authenticated transcript of the record and proceedings upon which said decision and judgment were made be sent to the United States Court of Appeals for the Ninth Circuit.

Dated at Honolulu, Territory of Hawaii, this 12th day of June, 1952.

SABLE HALL,
Plaintiff in Error.

By /s/ J. DONOVAN FLINT,
Her Attorney.

Certified true copy.

[Endorsed]: Filed June 12, 1952. [19]

[Title of Supreme Court and Cause.]

AFFIDAVIT IN SUPPORT OF JURISDICTIONAL AVERMENT

United States of America,
Territory of Hawaii,
City and County of Honolulu—ss.

J. Donovan Flint, being first duly sworn, on oath, deposes and says:

That he is the counsel of record for Sable Hall, Plaintiff in Error in the above-entitled cause;

That a Federal constitutional question is involved herein in that said Plaintiff in Error has been denied the due process guaranteed to her by the Fifth Amendment to the Constitution of the United States in that she was deprived of a fair and impartial trial by the trial court questioning a witness in a manner which revealed that the trial court believed the appellant to be guilty as charged and by the fact that the Territory was permitted to introduce the alleged stolen property into evidence without proof of the corpus delicti;

That from the entire record herein and particularly the decision of the Supreme Court of the Territory of Hawaii on the writ of error, it appears that the Supreme Court of the Territory of Hawaii committed manifest error as set out in the Assignment of Errors on file herein. [21]

Further affiant sayeth naught.

/s/ J. DONOVAN FLINT.

Subscribed and sworn to before me this 12th day of June, 1952.

[Seal] /s/ CLESSON Y. CHIKASUYE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires April 18, 1955. [22]

Certified true copy.
[Endorsed]: Filed June 12, 1952.

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes Sable Hall, Plaintiff in Error above named, by her attorney, and files the following assignment of errors upon which she will rely in the prosecution of her appeal in the above-entitled matter from the Judgment entered herein dismissing her writ of error and affirming the Judgment of the trial court:

Assignment of Error No. I.

The Supreme Court of the Territory of Hawaii erred in concluding that the trial court could question witness Boyce Blyler about the facts of the alleged crime even though said questioning ipso facto revealed that the trial court believed the appellant to be guilty as charged, thereby depriving the appellant of the right to a fair and impartial trial as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

Assignment of Error No. II.

The Supreme Court of the Territory of Hawaii erred in concluding that the appellant was not denied due process of law by the action of the trial court in permitting the alleged stolen property to be admitted into evidence without proof of the corpus delicti by the Territory of Hawaii.

Wherefore, Plaintiff in Error prays that judgment and decision of this cause be reversed and

the cause remanded with [24] instructions to discharge the appellant.

Dated at Honolulu, Territory of Hawaii, this 12th day of June, 1952.

SABLE HALL,
Plaintiff in Error.

By /s/ J. DONOVAN FLINT,
Her Attorney.

Certified true copy.

[Endorsed]: June 12, 1952. [25]

[Title of Supreme Court and Cause.]

BOND

Know All Men by These Presents:

That Sable Hall, of Honolulu, City and County of Honolulu, Territory of Hawaii, as Principal, and the Pacific Insurance Company, Ltd., a Hawaiian corporation, as surety, jointly and severally, are held, firmly bound and indebted to the Territory of Hawaii in the sum of Two Hundred Fifty Dollars ($250.00), upon this condition:

Whereas, Sable Hall, principal, has taken an appeal, as plaintiff, from the Supreme Court of the Territory of Hawaii to the United States Court of Appeals for the Ninth Circuit, to reverse the judgment dated on the 2nd day of June, 1952,

Now, Therefore, if the above bounden principal,

plaintiff, shall prosecute her appeal without delay and answer for and pay all costs if the appeal is dismissed or the judgment affirmed, or pay such costs as the appellate court may award if the judgment is modified, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, the parties hereto have hereunto set their hands and seals this 2nd day of June, 1952.

/s/ SABLE HALL. [27]

[Seal] PACIFIC INSURANCE COMPANY, LTD.

By /s/ L. L. THOMAS.

The foregoing bond is apprived as to the amount and sufficiency of surety.

[Seal] /s/ LOUIS LE BARON,
Supreme Court of Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 2nd day of June, 1952, before me appeared L. L. Thomas, to me personally known, who being by me duly sworn, did say that he is Treasurer of Pacific Insurance Company, Ltd., the corporation described in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors

and said L. L. Thomas acknowledged said instrument to be the free act and deed of said corporation.

[Seal] /s/ MARY LUIS,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires May 31, 1955.

Certified true copy.

[Endorsed]: Filed June 12, 1952. [28]

[Title of Supreme Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the petition filed herein by Plaintiff in Error above named for allowance of an appeal and it appearing that Notice of Appeal, together with a good and sufficient bond in the sum of $250.00 has been filed,

It Is Hereby Ordered that the appeal in the above-entitled cause be and the same is hereby allowed; and

It Is Further Ordered, that all further proceedings in this Court be, and there are hereby, stayed pending the disposition of this appeal.

Dated at Honolulu, Territory of Hawaii, this 12th day of June, 1952.

[Seal] /s/ LOUIS LE BARON,
Chief Justice, Supreme Court of the Territory of Hawaii.

Certified true copy.

[Endorsed]: Filed June 12, 1952. [30]

[Title of Supreme Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above-Entitled Court:

You will please prepare transcript of record of this cause to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings and papers on file, to wit:

1. Indictment.
2. The verdict.
3. The transcript of the evidence at the trial.
4. Opinion and decision of the Supreme Court of the Territory of Hawaii.
5. Judgment of the Supreme Court of the Territory of Hawaii.
6. Notice of Appeal.
7. Petition for Appeal.
8. Affidavit in support of jurisdictional averment.
9. Assignment of Errors.
10. Bond.
11. Order Allowing Appeal.
12. Praecipe for Transcript of Record. [32]

Dated at Honolulu, Territory of Hawaii, this 12th day of June, 1952.

SABLE HALL,
Plaintiff in Error.

By /s/ J. DONOVAN FLINT,
Her Attorney.

[Endorsed]: Filed June 12, 1952. [33]

[Title of Supreme Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Receipt from J. Donovan Flint, attorney for Plaintiff in Error above named, of the following filed in the Supreme Court of the Territory of Hawaii in the above-entitled cause is hereby acknowledged:

1. Notice of Appeal.
2. Petition for Appeal.
3. Affidavit in support of jurisdictional averment.
4. Assignment of Errors.
5. Bond.
6. Order Allowing Appeal.
7. Praecipe for Transcript of Record.

Dated at Honolulu, Territory of Hawaii, this 12th day of June, 1952.

TERRITORY OF HAWAII,
Defendant in Error.

By /s/ ALLEN R. HAWKINS,
Public Prosecutor of the City and County of Honolulu, Territory of Hawaii.

Certified true copy.

[Endorsed]: Filed June 12, 1952. [34]

[Title of Supreme Court and Cause.]

ORDER EXTENDING TIME TO PREPARE AND DOCKET RECORD ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Good cause being shown therefore,

It Is Ordered that the time allowed for preparing and docketing the record on appeal to the United States Court of Appeals for the Ninth Circuit be and it is hereby extended to September 10, 1952, being ninety days from the date of filing of the notice of appeal to the United States Court of Appeals for the Ninth Circuit, said notice of appeal having been filed on June 12, 1952.

Dated Honolulu, Hawaii, July 18, 1952.

[Seal] /s/ EDWARD A. TOWSE,
Chief Justice, Supreme Court,
Territory of Hawaii.

Certified true copy.

[Endorsed]: Filed July 18, 1952. [36]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

Cr. No. 21118

TERRITORY OF HAWAII

vs.

SABLE HALL,

Defendant.

TRANSCRIPT OF TESTIMONY

Before: Honorable John E. Parks, Judge.

Appearances:

ROBERT ST. SURE, ESQ.,
Assistant Public Prosecutor,
Counsel for the Territory.

GEORGE Y. KOBAYASHI, ESQ.,
Counsel for the Defendant.

Wednesday, August 17, 1949—9:00 A.M.

(The Clerk called the case.)

(A jury having been empanelled and sworn to try the above-entitled cause, the following proceedings were had and testimony adduced:)

The Court: Proceed.

Mr. St. Sure: At this time, Gentlemen of the Jury, I will read the indictment in this case. The indictment reads as follows: In the Cricuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, 1949. The Territory of Hawaii

versus Sable Hall, Defendant. Larceny in the First Degree. Indictment. The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that Sable Hall at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 14th day of April, 1949, did unlawfully and feloniously take and carry away certain things of marketable, saleable, assignable and available value, to wit: certain moneys in the sum and of the value of One Hundred and Sixty-three Dollars ($163.00) lawful money of the United States of America, a more particular description of which is to the Grand Jury unknown, of the moneys and property of Boyce Plyler, the owner thereof and entitled thereto, with intent in her, the said Sable Hall, to deprive the owner aforesaid of the moneys and property aforesaid, and did then and there and thereby commit the crime of larceny in the first degree, contrary to the form of the statute in such case made and provided. A true bill found this 25th day of April, A.D. 1949. Pierre L. LeBourdais, Acting Foreman of the Grand Jury. [3*] John R. Desha, Assistant Public Prosecutor of the City and County of Honolulu. Both signing the indictment.

After a short statement of the facts, the Government will prove that on the morning of April 14th, 1949, between the hours of 1:30 a.m. and 2:00 o'clock a.m., two sailors were walking down Smith Street in the direction, mauka direction, towards

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

the mountains. The place they were walking was opposite the Beretania Park, which is at the corner of Smith and Beretania Streets in Honolulu. Two sailors, one of whom was Boyce Plyler, the other one was Jackson. These two men were walking down Smith Street. They passed a place called Ruby's Shoeshine Shop. It is on the ewa side of the street, looking mauka on Smith Street. As the sailors passed Ruby's Shoeshine Shop, Sable Hall came out, went up to one of the sailors, Boyce Plyler, and called him aside. The boy had been drinking. We will prove that he had been feeling high.

This woman reached in the region of his penis, began playing with it on the outside of his pants, and at the same time, we will prove, she pulled his purse out of his pocket and took $163.00 from his wallet. After taking his money she left and went up the street toward Beretania Street.

At the time of the taking, we will show, the sailor did not know of it, but looking from the corner of Smith Street up towards Beretania Street, where the defendant met some other colored people, the sailor suspicioned that something was wrong, pulled out his wallet and found his money missing.

He pursued the defendant until she went into Kaumakapili Lane on Beretania Street. The sailor and his friend went into the head of the lane, and the sailor grabbed the [4] defendant's arm and asked for his money. She said she didn't have it. The commotion caused by this incident led a policeman, who was on duty at a nearby corner, to come

across the street and investigate. He rounded up all of them, including the other negroes, the three negroes who were with the defendant, and brought them to the corner of Nuuanu and Beretania, where he knew another officer was stationed. At this time the sailor complained that his pocket had been picked. The defendant refused to say anything to the complaint. She had her hand over her mouth. One of the officers asked her to open her mouth. As she did so she bent over and spit into her hand, and in making her open her hand the officer found the $163.00 in her hand. We will prove that it had been in her mouth, in the mouth of the defendant.

The defendant and the other witness, the other people, were taken to the Police Station. The defendant refused to say anything more to the complaint. She told the officers she knew nothing about the complaint, that there was no complaint. The sailor again identified the defendant down at the Police Station, and after you hear the evidence from the witnesses, gentlemen of the jury, you will have to return a verdict of guilty. Thank you.

The Court: Do you wish to make an opening statement, Mr. Kobayashi?

Mr. Kobayashi: We reserve the opening statement.

Mr. St. Sure: Our first witness is Officer Schwartzman.

CLIFFORD H. SCHWARTZMAN

called as a witness for and on behalf of the Territory, [5] being first duly sworn, testified as follows:

Direct Examination

By Mr. St. Sure:

Q. State your name, please.

A. Clifford H. Schwartzman.

Q. Will you spell it, please?

A. S-c-h-w-a-r-t-z-m-a-n.

Q. What is your occupation?

A. Police officer, Honolulu Police Department.

Q. Calling your attention to the date April 14th, 1949, I am referring to the morning of April 14th, 1949, were you in the vicinity of Smith and Beretania Streets in Honolulu? A. I was.

Q. What were you doing there, Officer?

A. I was on duty at that time, patroling the area.

Q. What were the hours of your duty there?

A. At that time it was about 1:45 a.m. We were on duty from midnight to 8:00 in the morning.

Q. Did you see the defendant, Sable Hall, there that night? A. I did.

Q. Is she in the courtroom here? A. Yes.

Q. Point her out.

A. (Witness indicating the defendant): That is Sable Hall.

Mr. St. Sure: May the record show that the witness identifies the defendant, Sable Hall?

Q. Will you step down from the chair there, Officer Schwartzman, and the Bailiff can get the

(Testimony of Clifford H. Schwartzman.)

blackboard. Officer Schwartzman, can you draw a rough sketch of Smith and Beretania Streets on the blackboard? [6]

A. Yes. (Whereupon Officer Schwartzman drew a diagram on the blackboard.)

Mr. Kobayashi: May I inquire whether Officer Schwartzman is being put on the stand just for the purpose of drawing this sketch?

Mr. St. Sure: Yes.

Witness (Indicating points on the diagram he drew on the blackboard): This is Waikiki, this is Beretania. We will call this Smith Street running mauka——

The Court: Can all the jurors see that sketch?

(No response.)

Witness (Continuing): This is Kaumakapili Lane. This is Beretania Park. That is——

Mr. Kobayashi: I object to that location being put on. What is 1190? I object to that.

Mr. St. Sure: That is to be properly identified later on.

The Court: If the Officer can connect it up the Court will reserve ruling.

Mr. St. Sure: Point it out.

Witness (Continuing): This is Beretania Street, ewa direction, Waikiki direction. This is Smith Street, running mauka. This is Beretania Park. This is Kaumakapili Lane. This 1190 Smith Street is the location of Ruby's Bootblack Stand where the alleged larceny took place.

(Testimony of Clifford H. Schwartzman.)

Mr. Kobayashi: I object to that statement by the Police Officer. He has been put on out of order. He is put on the stand just for the purpose of drawing that map. I move that the last statement of the Police Officer be stricken.

The Court: Mr. Kobayashi, he said this is what 1190 Smith Street represents. [7]

Mr. Kobayashi: That is all right up to there——

The Court: Where the alleged larceny took place.

Mr. Kobayashi: I moved that be stricken.

The Court: He said "alleged."

Mr. Kobayashi: He is out of order, even if he uses that term "alleged" or not. I don't think it is a proper statement by a police officer. He is put on out of order just to draw a map of the location of the place.

The Court: In view of how he has connected it all up in the use of the word "alleged" I think that it is proper.

Mr. Kobayashi: May we save an exception?

The Court: Yes.

Mr. St. Sure: Those are all the questions I have.

Mr. Kobayashi: I have no questions.

The Court (To the witness): You are excused. Thank you.

Mr. St. Sure: The next witness is Boyce Plyler.

BOYCE PLYLER

called as a witness for and on behalf of the Territory, having been first duly sworn, testified as follows:

Direct Examination

By Mr. St. Sure:

Q. State your full name for the record please.

A. Boyce Plyler.

Q. How do you spell your last name?

A. P-l-y-l-e-r.

Q. What is your present address, Mr. Plyler?

A. Receiving Station, Pearl Harbor.

Q. Are you attached to any branch of the Armed Services? A. Yes. Navy. [8]

Q. What is your rank? Where are you stationed?

A. At the Pearl Harbor Navy Yard at the present.

The Court: Talk loudly enough so all those gentlemen back there can hear you, please.

Q. Now, Mr. Plyler, calling your attention to the date, April 14th, 1949, were you in the vicinity of Smith and Beretania Streets in Honolulu?

A. Yes.

Q. When did you get to Honolulu on that day I have just mentioned? A. About 8:30.

Q. Start from the beginning and tell the Court and jury what happened.

A. I came in by plane from Midway, and landed at John Rodgers Field around 8:30. I caught a cab and went to the Receiving Station and checked

(Testimony of Boyce Plyler.)

out with the O.D. Then we came into town. On the way to town we stopped and bought a bottle, came on in and went to the Leonard Hotel and got a room. We went down to Yee Hop on Beretania Street and stayed there until it closed, then we went over on Hotel Street to a little Chop Suey place over there, and coming down Smith Street to Beretania Street where I met Sable Hall. She stopped me and asked me if I wanted a wahine. I kept on walking. She grabbed me by the arm and started feeling me up.

Q. What do you mean by "feeling you up"?

A. Playing with my penis and everything.

Q. Go on, what happened next, if anything?

A. So she told me to meet her down the street. She played with me between five and ten minutes. She told me to go on down the street and she would follow, so I turned the corner [9] at Beretania and Smith and she went the other way with another couple. I looked in my wallet. I seen this one man looking as if he was putting something in his pocket across the street. I looked in my wallet and there was nothing in there. I told the guy with me I had been rolled. We ran across the street. She turned down an alleyway——

The Court: Can you gentlemen away down there hear this witness?

Mr. St. Sure: Talk a little louder, please.

A. (Continuing): I ran down the alleyway and caught her by the arm, and told her to give me my

(Testimony of Boyce Plyler.)

money back. She told me she didn't have it. Then the officer came running up.

Q. Then what happened?

A. We went up to the corner. He called the partol wagon and everything, and we went down to the Police Station.

Q. Were you alone, or were you with someone else? A. I was with someone else.

Q. Who was that person, do you know his name?

A. Jackson.

Q. Who is Jackson?

A. The guy who was with me. He is on Midway now.

Q. Another sailor? A. Yes.

Q. Where is he now? A. On Midway.

Q. Now, can you identify the person you say—you allege took your wallet?

A. Yes, this is her. (Witness indicates the defendant.)

Q. This person here (indicating the defendant)?

A. Yes. [10]

Mr. St. Sure: May the record show that the witness, Boyce Plyler, identifies the defendant?

Q. Now, on the night of April 14th, 1949, did you have any money on your person?

A. Yes.

Q. That is before you met the defendant?

A. Yes.

Q. How much money did you have?

A. I had $160.00 in my wallet.

Q. What kind of a wallet did you have?

(Testimony of Boyce Plyler.)

A. Black zipper wallet.

Q. Did you have any other money on your person? A. Yes.

Q. Where did you have the other money?

A. I had it in my shirt pocket.

Q. What?

A. I had the money in my shirt pocket.

Q. How much?

A. Change from a ten-dollar bill. I don't know exactly how much.

Q. On that night, April 14th, 1949, how were you dressed? A. In civilian clothes.

Q. Describe your dress to the court and jury, please.

A. I had on a sport shirt and a regular pair of pants.

The Court: Talk louder.

A. I had on a sport shirt and civilian pair of pants.

Q. How was Jackson dressed?

A. He was dressed the same, sport shirt.

Q. Where did you have your wallet and money at the time you went down Smith Street?

A. In my left front pocket. [11]

Q. Whose money was that?

A. It was mine.

Q. Was it paper money, or otherwise?

A. Paper money.

Q. Can you describe it?

A. Yes. All twenty-dollar bills.

Q. How many twenty-dollar bills?

(Testimony of Boyce Plyler.)

A. Eight.

Q. Did you give the defendant, Sable Hall, any money that night of April 14th, 1949?

A. No.

Q. Did you give Jackson any money?

A. No.

Q. Were you drunk on the night of April 14th, 1949? A. Yes.

Q. How many drinks did you have?

A. I don't know.

Q. Few or many? A. In between.

Q. Were you sober?

A. Well, I was feeling my drinks.

Q. Was the defendant, Sable Hall, on the night of April 14, 1949, alone or with someone else?

A. She was alone when I met her. After she left me she went to two guys and another woman.

Q. Tell the court and jury where they were.

A. They were walking down Beretania Street.

Q. Do you know where they came from?

A. Yes, out of the shoeshine stand.

Q. Were they men or women? [12]

A. Two men and one woman.

Q. Did you notice their racial background?

A. Beg your pardon?

Q. Do you know the nationality—the race of those people? A. Yes, they were negroes.

The Court: Speak as loudly as you can. All those gentlemen have to hear you.

Q. Now, Mr. Plyler, do you see the blackboard here? A. Yes.

(Testimony of Boyce Plyler.)

Q. We have here a drawing of Beretania Street and Smith Street, and a lane here. Can you orient yourself to the drawing? Do you know where it is?

A. I know where it is.

Q. Please step down to the drawing.

(Whereupon the witness stepped down to the blackboard.)

Q. Take this green stick and stand a little to the side, and point out to the court and jury the location of the shoeshine stand first.

A. Right here (indicating a point on the blackboard). This is the shoeshine stand here.

Q. What were the conditions as to lighting on that morning of April 14, 1949?

A. I could see. The street light gave plenty light.

Q. Will you point out to the court and jury the exact spot where you first met Sable Hall, the defendant?

A. Right opposite the shoeshine stand.

Q. Did she talk to you at that time?

A. Yes.

Q. What did she say, if anything?

A. She was asking me if I wanted a woman. [13]

Q. Will you take this chalk and mark the spot where you met her and talked with her.

A. Right here. (Witness marks the spot on the blackboard.)

Q. Were you alone at the time?

A. No, I was with Jackson.

(Testimony of Boyce Plyler.)

Q. Where was Jackson? Point out where Jackson was.

A. Jackson walked on down to the corner of Beretania Street.

Q. What happened after that?

A. (Witness indicating different points on the blackboard.) She walked on down here and crossed the street, walking up Beretania. I was here at the corner with Jackson. I looked in my wallet. I seen there was no money there. I told Jackson I had been rolled. I ran after her. She turned down this alleyway and the other couple walked on up the street.

Q. Did this other couple say anything to you folks? A. No.

Q. Did the defendant yell or holler at any time?

A. No.

Q. This all happened in the City and County of Honolulu, Territory of Hawaii? A. Yes.

Q. Did you talk with these other colored people that were with Sable Hall? A. No.

Q. Do you know whether Jackson talked to them or not? A. I don't know.

Q. The money you had was United States money, currency? A. Yes.

Q. I don't know whether I asked you, what time of morning [14] was it when this alleged larceny happened?

A. It was around 2:00 o'clock in the morning.

Q. What had you been doing before then, before you got to Smith Street? A. Drinking.

(Testimony of Boyce Plyler.)

Q. Was Jackson drinking, too?

A. Yes.

Q. Now, on the corner of Beretania and Nuuanu Street, when the officers arrived, did you see anything unusual about the defendant?

A. The officer asked her what she had in her mouth. She had her hand up like this (witness demonstrating). She said "nothing in my mouth."

Q. Did you look at her face?

A. I seen her in the face. I was looking her in the face.

Q. Was there enough light?

A. Plenty of light.

Q. Did you see anything unusual?

A. She had an odd shape in her mouth as if she had something in it.

Q. Did you identify the defendant down at the Police Station in Honolulu? A. Yes.

Q. Is this the same woman present in court today? A. Yes.

Mr. St. Sure: Your witness.

Cross-Examination

By Mr. Kobayashi:

Q. Mr. Plyler, you say when you were coming out from Pearl Harbor to Honolulu you bought a bottle, is that right? [15] A. Yes.

Q. What kind of bottle? A. Whiskey.

Q. And the brand, Bourbon?

A. Whiskey. I don't know what kind.

Q. Just whiskey? A. Yes.

(Testimony of Boyce Plyler.)

Q. Quart bottle? A. Four-fifths.

Q. What happened to that bottle, did you drink it all?

A. We took it to the hotel room, and left it in the hotel room.

Q. Never took a drink?

A. Yes, we took a drink.

Q. How much of that bottle did you drink?

A. Maybe two drinks.

Q. After you went to this Yee Hop you had more to drink? A. Yes.

Q. When you left Pearl Harbor how much money did you have? A. $170.00.

Q. $170.00? A. Yes.

Q. You are sure of that? A. Positive.

Q. What denominations were they?

A. I had eight twenties and a ten.

Q. Is that all the money you had with you?

A. That was all the money I had with me.

Q. Who paid for that bottle of liquor?

A. Jackson. [16]

Q. When you checked in at the Leonard Hotel, who paid the hotel bill? A. Jackson did.

Q. When you went to Yee Hop, who paid for that?

A. That is where I broke the Ten Dollar bill.

Q. How much did you spend at Yee Hop's?

A. I don't know.

Q. You don't know? A. No.

Q. How many drinks did you have at Yee Hop's?

A. I don't know that either.

(Testimony of Boyce Plyler.)

Q. You don't remember that? A. No.

Q. One or two?

A. Three or four. Maybe more.

Q. Whiskey? A. No, beer.

Q. Who paid for those drinks? A. I did.

Q. You did? A. Yes.

Q. You don't know how much you paid for those beers? A. No.

Q. You don't know what the bill was?

A. No.

Q. Later on where did you go, after Yee Hop's?

A. We went up to a little Chop Suey place on Hotel Street.

Q. Do you know the name of the place?

A. No.

Q. Did you have anything to eat? [17]

A. Yes, I had something to eat.

Q. Anything to drink?

A. Nothing to drink.

Q. What did you eat? A. Chop Suey.

Q. Did you just order chop suey? A. Yes.

Q. Who paid for that?

A. I paid for mine. Jackson paid for his.

Q. You paid for yours out of the change from the Ten Dollar bill you broke at Yee Hop's?

A. Yes.

Q. You had all that change in your shirt pocket?

A. Yes, in my shirt pocket.

Q. You had $170.00 when you left Pearl Harbor, eight twenties and one ten, and when you got to Yee Hop you took the Ten Dollars and paid for the

(Testimony of Boyce Plyler.)

drinks, then your share of the chop suey, and kept the change in your shirt pocket, is that right?

A. Yes.

Q. Now, you say you met the defendant on Smith Street, is that right? A. Yes.

Q. At that time where did you have your wallet?

A. In my left front pocket.

Q. You say you talked to the defendant about five minutes, is that right?

A. Five to ten minutes, yes.

Q. Then the defendant left you, or you left the defendant, and you reached in your pocket for your wallet, is that right? A.. Yes. [18]

Q. At that time you found no money in your wallet? A. That's right. No money.

Q. When was the last time you looked in your wallet before that time?

A. When I left the hotel.

Q. When you left the hotel? A. Yes.

Q. Was that the last time?

A. The last time. I never had my wallet out of my pocket.

Q. What did you do in the hotel when you looked at it?

A. Counted out my money and put my wallet in my pocket.

Q. Put everything back, the whole $170.00?

A. No, I put $160.00 back, and $10.00 in my shirt pocket.

Q. When you were standing on the corner of Smith and Beretania, with Jackson, at that time

(Testimony of Boyce Plyler.)

the only money you had was what you had in your shirt pocket, is that right? A. Yes.

Q. How much was in your shirt pocket?

A. Two or three dollars.

Q. Let me get this straight: You went to the Leonard Hotel? A. Yes.

Q. And that was the last time you looked in your pocket book?

A. Yes, the last time.

Q. You had $170.00 exactly? A. Yes.

Q. You pulled out a Ten Dollar bill and put it in your shirt pocket? A. That's right. [19]

Q. Stuck your wallet in your pocket and never looked at it again?

A. Never looked at it again.

Q. And when you took out your wallet on Beretania and Smith Streets there was no money in there, is that right—on Beretania and Smith?

A. That's right.

Q. All you had in your pocket was a couple of dollars? A. That's right.

Q. Two or three dollars, you don't know the exact amount?

A. I don't know the exact amount.

Q. As far as you know, you don't know who took your money, of your own knowledge?

A. Of my own knowledge I don't.

Mr. Kobayashi: No further questions. That is all.

The Court: Any further questions?

Mr. St. Sure: Yes, your Honor.

(Testimony of Boyce Plyler.)

Redirect Examination

By Mr. St. Sure:

Q. At the time you took the wallet out to look at it, was the zipper to the wallet open or closed?

A. Open.

Q. At the time of this theft of your money——

Mr. Kobayashi: I object to the word "theft." There is no proof of theft. Loss of money, that is all there was. He admits that. From the evidence here there is no ground for the Prosecution to use the word "theft" here.

The Court: In view of the testimony adduced so far I think that is permissible.

Mr. Kobayashi: The word "theft"?

The Court: Yes. [20]

Mr. Kobayashi: May we save an exception?

The Court: Yes.

Q. (By Mr. St. Sure): Now, at the time that money was taken on the morning of April 14th, 1949, did you see anyone beside you at that time except the defendant? A. No.

Mr. St. Sure: No further questions.

Mr. Kobayashi: No questions.

The Court: I have a few questions to ask you.

Q. (By the Court): Did you give Sable Hall permission to take any money from you that night?

A. No.

Q. You say that she was playing with your penis when you first met her, is that right?

A. That's right.

(Testimony of Boyce Plyler.)

Q. Step down and show the jurors what she was doing, where her hands were, outside your clothing, or inside your clothing.

Mr. Kobayashi: May we take an exception to the Court's line of questioning?

The Court: Yes, you may have an exception.

Q. (By the Court): Do you understand the question? A. Yes.

Q. Step down and show the jurors where her hands were. Were her hands outside your clothes?

A. One was inside and one in my front pocket.

Q. Which pocket? A. Left front pocket.

Q. Show the jurors the best you can.

A. (Witness demonstrates to the jury.) She had one hand [21] in here and the other one in my left front pocket. She was standing facing me.

The Court: All right, you can take the stand again.

Mr. Kobayashi: May my exception go to all the questions of the Court?

The Court: Yes.

Q. (By the Court): When you put the money in the wallet, you say you put $160.00 in the wallet?

A. Yes.

Q. Did you close your zipper when you put your money in there? A. I don't remember.

Q. Which pocket did you put your wallet in?

A. My left front pocket.

The Court: That is all. Any further questions?

Mr. Kobayashi: No questions.

Mr. St. Sure: No questions. Call Officer Henry Guigni.

HENRY K. GUIGNI

called as a witness for and on behalf of the Territory, being first duly sworn, testified as follows:

Direct Examination

By Mr. St. Sure:

Q. State your full name, please.

A. Henry K. Guigni.

Q. What is your occupation, officer?

A. Member of the Honolulu Police Department.

Q. Do you know Sable Hall, the defendant in this case? A. I do. [22]

Q. Point her out in the courtroom.

A. (Indicating the defendant.) The woman in the green dress.

Q. Calling your attention to the date April 14th, 1949, did you see the defendant on that date?

A. I did.

Q. Where did you see her?

A. On Beretania and Kaumakapili Lane.

Q. Is that in the City and County of Honolulu?

A. It is.

Q. What hour of the day or night was it?

A. 1:45 in the morning.

Q. Did you at that time and place see a sailor by the name of Boyce Plyer, the man who was just on the witness stand? A. I did.

Q. Tell the Court and jury just what happened when you saw these people on April 14th, 1949, at the alleged hour, 1:45 a.m.?

A. About five minutes prior to that I was stand-

(Testimony of Henry K. Guigni.)

ing on the corner of Nuuanu and Beretania. I had that beat that night. I was foot man. I started to walk toward Smith Street. Just as I approached that Lane I saw some people scuffling. I ran over there and I remember the sailor said "I have been robbed." Being at the time a very new officer, I collected everyone that was there and took them back to the corner of Nuuanu and Beretania, where I knew Officer Schwartzman was, and turned them over to Officer Schwartzman.

Q. You say you rounded up some other people, too? A. I did.

Q. Will you describe those people?

A. An elderly colored woman. She owned the shoeshine stand [23] on Smith Street, another colored fellow, and another sailor.

Q. Was there anybody else there?

A. That is all I can recall.

Q. Did the defendant say anything to you?

A. She did not. She had kept holding her mouth.

Q. Describe that to the Court and jury.

A. She kept holding her mouth and mumbling, holding her jaw. After I turned them over to Officer Schwartzman he questioned her. He was talking to her. I pulled everyone aside and kept them away from the defendant.

Q. Then what happened, Officer?

A. Then I waited for the matron to arrive. When I went back to talk to Schwartzman I noticed he had some money in his hand. We went down to

(Testimony of Henry K. Guigni.)

the Station and we counted out the money, and there was $163.00, eight Twenty Dollar bills and three Dollar bills, and we took the numbers of each bill.

Q. What do you mean?

A. The serial numbers of each of the bills.

Q. Who noted down the serial numbers of the bills?

A. Officer Schwartzman. I read them off and Officer Schwartzman typed it out.

Q. That was down at the Police Station?

A. It was.

Mr. St. Sure: No further questions.

Mr. Kobayashi: No questions.

The Court: You are excused. Thank you. The Court will take a short recess.

(Recess.)

The Court: The record will show the jury are all [24] present, and the defendant. Proceed.

Mr. St. Sure: I will recall Officer Schwartzman.

CLIFFORD H. SCHWARTZMAN

recalled as a witness for and on behalf of the Territory, having been heretofore duly sworn in this cause, testified further as follows:

Direct Examination

By Mr. St. Sure:

Q. Please state your name for the record again.

A. Clifford H. Schwartzman.

Q. You have already been sworn in?

(Testimony of Clifford H. Schwartzman.)

A. Yes, I was.

Q. You are a police officer of the Honolulu Police Department? A. Correct.

Q. On the morning of April 14th, 1949, were you in the vicinity of Beretania and Smith Streets in Honolulu? A. I was.

Q. Were you on duty that morning?

A. Yes, sir.

Q. What were your hours of duty?

A. Midnight to eight in the morning.

Q. And on the alleged date, April 14th, 1949, did you see the defendant, Sable Hall?

A. I did.

Q. Did you see the sailor named Plyler?

A. Yes.

Q. He is the sailor who testified here previously?

A. Yes.

Q. Tell the Court and jury just what happened on the alleged date, April 14th, 1949? [25]

A. Well, I was called to the corner of Nuuanu and Beretania Street by Officer Guigni. He had along with him this defendant, Sable Hall, another negro woman, a negro male, the complainant in this case, Plyler, and another sailor friend of his, and Guigni told me that this sailor, Plyler, had made a complaint of having some money taken from him.

Mr. Kobayashi: Was the defendant present at that time?

A. She was. Officer Guigni said Plyler had made a complaint of having money taken from him by this defendant. At the time the group was there

(Testimony of Clifford H. Schwartzman.)

on the corner I noted this defendant. She had a bulge in her mouth, and I asked her what she had in her mouth, and she gave no answer. I continued to ask her questions and she would make no answer whatsoever. So we questioned the sailor a little bit about what had taken place and everything, and at that time I placed this defendant under arrest for suspicion of larceny, and continued to ask her what she had in her mouth. At that time she bent over and removed what was in her mouth and put it in her hand. When she took her hand away from her mouth I seen it was a wad, looked like money, it was green paper. I asked her to open her hand and she opened her hand and I took money out of her hand. It was $163.00; there were eight twenty dollar bills, and three one dollar bills. In the meantime we had called for the police patrol wagon, with the matron, and they arrived about that time, and all the parties there were taken to the Station, with this other colored male and colored woman. It didn't seem at that time that they were involved in this case, so we asked them to come of their own accord. They agreed. They came down, so we all went down to the Station. [26]

Q. There was the colored male and the woman besides the defendant? A. Yes.

Q. There were not two colored males?

A. No, sir.

Q. Did these colored people that were there, did they say anything to you?

(Testimony of Clifford H. Schwartzman.)

A. They did. They said they did know what it was all about. They had just closed up the shoeshine parlor, and they were on their way home, and they happened to meet Sable Hall on the street and they were walking along with her.

Q. Did Sable Hall say anything to you?

A. She didn't say anything.

Q. At any time? A. At no time.

Q. Did the sailor say anything to you?

A. Which sailor?

Q. The sailor Plyler? A. He said——

Mr. Kobayashi: Where was this, the time and place.

Mr. St. Sure: Withdraw that question.

Q. At the time you had the defendant on the corner of Nuuanu and Beretania, you said she had a wad of money in her mouth, or what appeared to be money, did the sailor, Plyler, say anything to you? A. Yes, he did.

Q. What did he say?

A. He told us how he and his friend were walking along Smith Street when they were approached by this defendant, [27] and they stood on the street there in the vicinity of 1190 Smith Street.

Mr. Kobayashi: I object to this line of questioning. The man himself, the complainant, testified. The best evidence is the man himself. He testified a little while ago.

The Court: But since the defendant was present at the time, if he wishes to bring it out the Court will allow it.

(Testimony of Clifford H. Schwartzman.)

Mr. Kobayashi: What is the purpose? The complainant is right here, unless the Prosecution is trying to impeach its own witness.

The Court: I suppose it is to corroborate his testimony.

Mr. St. Sure: That's it.

The Court: He told us how the defendant had approached him. They had a few words there and this defendant started touching him all over the body, and then had walked away. Then he had missed his money, and then he ran up Beretania Street after her and then he caught her and asked her if she had taken his money, and there was some sort of commotion there and Officer Guigni went to the scene. I believe the sailor caught her at Kaumakapili Lane and Beretania.

Q. (By Mr. St. Sure): Going back to this money, Officer Schwartzman, what happened to the money?

A. When I took the money from her hand it was in my possession all the time. When I returned to the Police Station I made an evidence report, and we took down the serial numbers of the money. Officer Guigni read off the [28] numbers and I typed them on the report. Then they were sealed in an envelope and turned over to the Desk Lieutenant, and locked in a safe.

Q. Have you that money with you now?

A. I have the money.

Q. Please give it to me.

(Testimony of Clifford H. Schwartzman.)

A. (Whereupon the officer, the witness, handed to the Prosecutor an envelope.)

Mr. St. Sure: May this envelope containing what appears to be money be marked for identification as Prosecution's Exhibit 1 for identification?

The Court: Yes, it may be marked Prosecution's Exhibit 1.

(The envelope above referred to was received and marked Prosecution's Exhibit 1 for identification.)

Q. Down at the Police Station did you talk to the defendant at any time? A. No, I didn't.

Q. I show you officer—just a minute while I show this exhibit to counsel.

(Whereupon the Prosecutor handed to counsel for the defendant Prosecution's Exhibit 1 for identification.)

Q. I show you Prosecution's Exhibition 1 for Identification, which I hand you, will you please identify the exhibit. What is in there, officer?

A. $163.00.

Q. Where did you get it?

A. I took it from the defendant on the night in question.

Q. Have you the serial numbers?

A. I had the serial numbers. [29]

Q. You have it here? A. Yes.

Q. On a paper? A. On a paper, yes.

Q. Please show it.

(Testimony of Clifford H. Schwartzman.)

A. (Witness submits a piece of paper.) This is the paper with the serial numbers.

Q. You typed it down personally?

A. Yes.

Q. Read it off.

A. Item 1: Eight $20.00 bills in U. S. currency, $160.00. The first one L, as in Los Angeles, 93227470-A, as in Albany. No. 2, L, as in Louisiana, 01231821. The third one, L, as in Los Angeles, 31655647-A, as in Albany. 4. L, as in Los Angeles, 77333525-A, as in Albany. 5. L-52269556-A. 6. L-86678099-A. 7. L-98502843-A. 8. L-18108741-B, as in Boston. Item No. 2, three $1.00 bills, the first, N, as in Nevada, 50079303-D, as in Denver. The second one, C, as in Chicago, 682858547-D, as in Denver. The third one, W, as in Washington, 837318198-D, as in Denver. A total of $163.00.

Q. Did you check the numbers with the serial numbers of the bills?

A. They were checked after this was read off to me. I checked them again.

Q. Did they correspond? A. They did.

Q. Now, this is the money you say you took from the hand of Sable Hall, the defendant in this case?

A. Yes. [30]

Q. On the night of April 14th, 1949?

A. Yes, sir.

Mr. St. Sure: At this time we offer Prosecution's Exhibit 1 for Identification in evidence as Prosecution's Exhibit 1.

The Court: Any objection?

(Testimony of Clifford H. Schwartzman.)

Mr. Kobayashi: We object under the theory that the only way money can come in is when money has been properly marked. That doesn't mean the officer hadn't seen the money and marked the money in order to be received. In this sort of a case money has to be properly marked, but not as here in this case when there is just an inference, because of the possession of money, that there has been a larceny committed. I think I have authorities to that effect. I don't remember what the section is, but I remember there is such a section. I am trying to get the book now, Wigmore on Evidence. It cannot be received except where the money is marked, not because there is an inference of larceny by the money being in the possession of this defendant.

The Court: There is evidence——

Mr. Kobayashi: There will be if the money is received. We have nothing else here except possession of the money by the defendant.

The Court: Let me ask one or two questions before I rule on this objection.

Questions by the Court:

Q. The envelope here contains bills you identified, Prosecution's Exhibit 1 for Identification, which I now show you, Officer. When you got the currency, as you say, from [31] the defendant's, Sable Hall, hand on this particular night in question, what did you do with it?

A. I put it in my pocket.

Q. What did you do after that?

A. I had it with me all the time until this Evi-

(Testimony of Clifford H. Schwartzman.)

dence Report was made out, and then I turned it in.

Q. You had it in your possession at all times from the time you took it from the defendant's hand at the place where you picked up these people?

A. Yes, sir.

Q. After that you made out an Evidence Report?

A. Yes, sir.

Q. You took the money out of your pocket, did you? A. Yes, sir.

Q. How did you make out the Evidence Report?

A. The money was on the table. I was at the typewriter. Officer Guigni was next to me. He took the money and he read off the serial numbers as I typed them. Then he laid the bills on the table. After we finished each one I took the bill and rechecked the serial numbers.

Q. Was that money in your presence all the time——

A. All the time.

Q. (Continuing): When this other officer was reading off the numbers to you? A. Yes.

Q. After you had the numbers read off you typed them on that piece of paper?

A. As he was reading them off I was typing.

Q. (Indicating a paper in the hands of the witness): That is the piece of paper you typed them on? [32] A. Yes, sir.

Q. You checked that? A. Yes.

Q. To make sure they were called off correctly?

A. Yes.

Q. After that what did you do with the money?

(Testimony of Clifford H. Schwartzman.)

A. The money was sealed in this envelope and turned over to Lt. Kennedy. He signed for the money at the time the envelope was sealed.

Q. This money you have brought into court, which the Court has marked Prosecution's Exhibit 1 for Identification, is the money you took from the defendant, Sable Hall? A. Yes, sir.

Mr. Kobayashi: Ordinarily money is not admissible in evidence. There are two exceptions to that; one, if there is proof here that the defendant before, just immediately prior to that, didn't have that amount of money, and has a sudden wealth after that, it might be permissible on that ground. The other ground is where the money has been properly identified before hand. Those are the only two exceptions where money can be admitted in evidence. That is Wigmore, section 164, in larceny cases.

The Court: The Court will overrulue your objection.

Mr. Kobayashi: May we save an exception.

The Court: Yes. The money and envelope is received in evidence as Prosecution's Exhibit 1, in one exhibit.

(The envelope and currency above referred to were received in evidence and marked Prosecution's Exhibit 1.) [33]

Mr. St. Sure: I have no further questions.

Mr. Kobayashi: Just one question.

(Testimony of Clifford H. Schwartzman.)

Cross-Examination

By Mr. Kobayashi:

Q. Did you actually see the money come out of the defendant's mouth into her hand?

A. Yes, sir.

Q. Although she bent over taking it out?

A. Yes.

Q. Was this on Beretania and Smith Streets?

A. No.

Q. Beretania and Nuuanu Streets?

A. Yes, sir.

Q. When was the first time you saw the defendant in the alley there?

A. Not in the alley, no. At the corner of Nuuanu and Beretania.

Q. The defendant all along, she didn't say anything? A. Nothing was said by her.

Q. How long was the defendant detained in the Police Station? A. I don't know.

Q. Don't you remember? A. No.

Q. When was she taken to the Police Station, do you know? A. That same morning.

Q. April 14th? A. Yes, sir.

Q. Do you remember when she was charged and released? A. No, I don't. [34]

Q. Who did the charging?

A. I don't know. I believe it was Detective Lum.

Q. Is that Joe Lum?

A. I don't know the person.

(Testimony of Clifford H. Schwartzman.)

Mr. Kobayashi: That is all. No further questions.

The Court: Just a moment. I have some questions.

Q. (By the Court): Did you ask Sable Hall any questions that night?

A. Yes, sir. I asked her if she wanted to say anything, and she didn't want to say anything. She wanted to talk to her attorney. That is what she told be to do, talk to her attorney. I asked her if she wanted to make a denial. She said to talk to her attorney.

Q. You asked her questions all along and she didn't say anything?

A. Yes, sir.

Recross-Examination

By Mr. Kobayashi:

Q. As a policeman you know she has a perfect right any questions when you talked to her?

A. Yes, sir.

Mr. Kobayashi: That is all.

The Court: Any more witnesses.

Mr. St. Sure: I would like to recall Officer Henry Guigni.

OFFICER HENRY GUIGNI

recalled as a witness for and on behalf of the Territory, having been heretofore duly sworn, testified further as follows:

The Court: You have already been sworn. [35]

Direct Examination

By Mr. St. Sure:

Q. Officer Guigni, on the night of April 14th, 1949, at the hour of 1:45 a.m., I think you testified you heard a commotion on Kaumakapili Lane off Beretania Street?

A. It was not in the Lane. It was on Beretania Street itself, but by Kaumakapili Lane.

Q. At the time you arrived did you go up to the Lane itself? A. Yes.

Q. Can you point it out on the board?

A. Yes. (Witness indicates a point on the blackboard.)

Q. Tell us what you saw and what happened?

A. (Indicating a point on the blackboard.) I take it this is Nuuanu, and this the side street. I was walking from here to here, taking this as the road and the cross-walk. The scuffling was right here. I came across the street, and I pulled everyone here. Two people—I believe two, that were with Miss Hall, started to walk this way, away from there, so I called them back and took them all together.

Q. What were those other two people that were walking away, what were they doing?

(Testimony of Officer Henry Guigni.)

A. It just seemed as if they wanted to get away from the scene.

Q. Who was scuffling?

A. Mr. Plyler and Miss Hall.

Q. Did you see the other sailor?

A. He was standing by.

Q. Did you hear the sailor say anything, that is Plyler?

A. Plyler claimed he has been robbed—been rolled.

Q. Did Sable Hall say anything? [36]

A. No, I didn't hear her say anything. She had something in her mouth and kept holding her jaw as if she had a toothache.

Mr. St. Sure: No further questions.

Mr. Kobayashi: No questions.

The Court: Do you have any further evidence?

Mr. St. Sure: That is the case for the Government, your Honor.

Mr. Kobayashi: I move for a directed verdict, on the ground that there is a fatal variance between the allegation and the proof.

The Court: What is the ground?

Mr. St. Sure: If there is going to be an argument, may I suggest the jury be excused?

The Court: Yes, the jury may be excused.

(Whereupon the members of the jury left the courtroom.)

Mr. Kobayashi: The allegation in the indictment is that there has been a sum of $163.00 stolen

from the person of Boyce Plyler, and the proof here is, and that came directly from Boyce Plyler, that he only had $160.00 in his wallet. The defendant is charged with larceny of $163.00. We believe that is a fatal variance, that under all the rules of criminal law that is a very fatal variance. Secondly, there has been no proof here that the defendant had taken away any money from the complaining witness. On those two grounds we ask for a directed verdict. There isn't even a scintilla of evidence that she is guilty of this crime, which requires certain elements that have not been met at all. Those are our grounds.

The Court: Ruling on your motion, Mr. Kobayashi, to constitute larceny, the statute says it is a felony, [37] the taking of anything of marketable, saleable, assignable or available value, belonging to or being the property of another. That is larceny. A person has the intent and commits the overt act. It doesn't make any difference what the value of the property is, except it fall under one of two categories, larceny in the first degree, or larceny in the second degree. That is where the value comes in, as long as it is property, and section 11438 provides for the degree. It says: "Larceny is of two degrees, first and second. Larceny of the property of the value of more than $50.00 is in the first degree." So far as the fatal variance is concerned, the proof being, from the stories of the Prosecution's witnesses, this defendant took over $50.00, and so that being the case whether it is $160.00 or $163.00, that this particular complainant misses, is immaterial,

because that still falls into the first degree larceny category. That being your first ground, the Court will overrule it. The second ground was——

Mr. Kobayashi: May I make a statement on that? As I understand it, in a question of money it is like a bank note, promissory note, etcetera. Any material variance is fatal—that if the allegation is that he has stolen $100.00 and the proof is that it is an entirely different sum of money, I believe that that is a fatal variance, not in the sense the Court has stated. I know what the Court is stating, the only time it makes any difference is whether it becomes first or second degree larceny. Here we have a question of money which can be described with definiteness. You know whether you have had $100.00 or $120.00. You can't go around and state that a defendant [38] stole $1,000 and finally prove she stole $100.00, or make a statement that he lost $100.00 and that same sum of money was found on her. Where there is a definite variance—the complainant says he couldn't possibly have had $150.00——

The Court: I don't recall his making such a statement. He said he had $160.00 plus some change from a $10.00 bill.

Mr. Kobayashi: I brought that out. I asked him what he did. He had $170.00. I asked him two or three times. He said he took $10.00 out of his wallet and left $160.00 in his wallet. That was the last time he touched that purse. The change out of the $10.00 was still in his pocket. He said he had some change.

The Court: That is a matter of argument,

whether she got this $160.00 from the wallet and $3.00 from the change that was left over, or whether she got the $3.00 from somebody else, or had it on her person. As far as the Court is ruling, the Court finds, if the testimony of the Prosecution's witnesses is to be believed, she got over $50.00 from this particular complainant, which would bring it in the category of larceny in the first degree. Just how much over that she got is immaterial so far as this case is concerned. I can see your point and under different circumstances you might have something. For instance, suppose she was charged with taking this particular sum, this particular money, and it was found to be some other money from somebody else, or some other place, or some other circumstances showed up, but in this case it is the same money that everybody is talking about, but there may be $3.00 of it that conceivably would have to be turned back to the [39] woman when the trial of the case is finished.

Mr. Kobayashi: Save an exception.

The Court: Exception noted. Anything further? If not, the Court will direct the jury to be brought back.

(Whereupon the members of the jury returned to the courtroom and resumed their places in the jury box.)

The Court: The record will show the jurors art all present. Proceed.

Mr. Kobayashi: The defense rests, your Honor.

The Court: Anything further, then? The Defense is resting. You have nothing further?

Mr. St. Sure: No, I haven't, your Honor.

The Court: Do you have your Instructions ready or not?

Mr. St. Sure: I have.

Mr. Kobayashi: I have not.

The Court: Will it be convenient for both attorneys if the Court directs the jury to return at 2:00 o'clock?

Mr. St. Sure: That will be satisfactory, your Honor.

Mr. Kobayashi: Yes, your Honor.

The Court (To the jury): You are excused then until 2:00 o'clock this afternoon.

(Whereupon the jury left the courtroom.)

The Court: Mr. Kobayashi, will you be able to have your instructions ready by 1:30?

Mr. Kobayashi: I have only one instruction.

The Court: Do you have all your instructions, Mr. St. Sure?

Mr. St. Sure: Yes, your Honor. [40]

The Court: Suppose you leave your instructions and the Court will look at them. Give Mr. Kobayashi a copy, and I will get together with both attorneys in Chambers at 1:30, or sooner if you can be here, to go over the instructions. If there is nothing further the Court will recess until 1:30.

(11:00 a.m., the Court recessed until 1:30 p.m.) [41]

Wednesday, August 17, 1949—1:50 o'Clock P.M.

(In Chambers.)

(The Clerk called the case.)

(Settling of Instructions. Following the settling of instructions the following proceedings were had:)

Mr. Kobayashi: May I be allowed to make a further ground on my motion to dismiss. I left out one point.

The Court: In what respect to dismiss the charge?

Mr. Kobayashi: Upon insufficient evidence. The other was fatal variance, and the third point I want to bring out is—I want to press that point now at the end of the case, about the inadmissibility of the evidence as to the money they found, etcetera, because at that time we didn't know how it was going to be connected. I object now. I wanted to get a motion to strike after I closed my case. I have a hunch I am a little late now. I wanted to make a motion to strike the testimony of the witnesses as to the finding of the money.

The Court: They testified they saw a bulge and she spit it out.

Mr. Kobayashi: Yes. At that time I objected to the money going into evidence.

Mr. St. Sure: Did you state the reason?

Mr. Kobayashi: I gave the reasons. I don't know whether I stated the other reason, that unless there is a showing by direct evidence, a prima facie

case of larceny connecting this defendant up with the larceny it is not admissible.

The Court: Do you have anything else?

Mr. Kobayashi: That is all. I want to get it in [42] in open court.

The Court: Do you want to make it now?

Mr. Kobayashi: I am doubtful about making a motion without the presence of the jury, whether it is sufficient. We have a jury case, I have to make it in the presence of the jury. The record will show I actually made the original motion in the presence of the jury.

The Court: The Court will note your motion and overrule it.

Mr. Kobayashi: Save an exception.

The Court: Exception noted.

Mr. Kobayashi: May I at this time be permitted to make a motion to strike the testimony of the witnesses Schwartzman and Guigni as to the finding of the money, on ground that at that time, besides the other two grounds I stated, on the ground there is no direct evidence, no prima facie case that there was any larceny being committed; that the evidence, like a confession, is inadmissible. In other words, it would be like a defendant being forced to testify against herself. I objected at that time and the Court overruled me. We went on further——

The Court: Your motion to strike is denied.

Mr. Kobayashi: I want to be permitted to make a motion to strike.

The Court: The motion to strike is denied.

Mr. Kobayashi: 32 American Jurisprudence,

1040, that is the basis for my motion. That is why I was concerned about Officer Schwartzman coming in out of order. The only evidence we have here is that he found the defendant with the money in her hands. That is all we have up to there. [43] Then they bring in the fact that she had some money in her mouth. My contention is that is not admissible, unless there is a prima facie case of larceny by direct or circumstantial evidence. If they had stopped at that time there is no prima facie case of any larceny. The man himself says he doesn't know how he lost his money.

The Court: He didn't say exactly he did know how he lost his money. His testimony was he didn't look in his wallet after putting it in his pocket.

Mr. Kobayashi: As far as we know we don't know how he lost the money. He said he didn't.

The Court: Is that his action after he thought he lost the money by running after the defendant after his suspicions were aroused?

Mr. Kobayashi: That is not a prima facie case of larceny. They didn't establish a prima facie case until they found the money in her possession.

The Court: The point you are contending for is a matter of argument, since he put his money in his pocket early in the evening at the hotel and didn't look at his wallet again. Someone else could have come along and taken the money, or any sort of thing could have happened since in the meantime a lot of time had gone by, but then the Prosecution brought out how he knew he lost the money. His testimony shows, and his actions on that night show how he lost the money, his suspicions were aroused

immeditaely after she stopped playing with him. He looked in his wallet, his money was gone, he ran after the woman. When the police came up she had a bulge in her mouth. When she removed the bulge the policeman saw it was money. If she didn't commit the [44] crime, why did she keep it in her mouth?

Mr. Kobayashi: Our contention is, that the basis of our motion to strike all that is the fact that at the time, up to the time when they say they found this bulge and contents in her mouth, up to that time I claim the Prosecution did not establish a prima facie case of larceny. All the elements were not present. Therefore, without having established a prima facie case that evidence is not admissible. Those are the only grounds I have. That is my understanding of the law. In my opinion all the elements of the crime of larceny were not present. If we had stopped right then, before they talked about finding the bulge in her mouth, without establishing a prima facie case of larceny, either by direct or circumstantial evidence, that evidence could not come in.

The Court: The Court will overrule you on that, Mr. Kobayashi, because on the order of the witnesses the complaining witness was about the first witness and since his testimony and the other was all connected up. It is all a matter of argument.

Mr. Kobayashi: Save an exception.

The Court: Yes. Anything further now?

Mr. Kobayashi: No, your Honor.

(After a short recess, Court reconvened at 2:20 p.m.)

The Court: Let the record show the jurors are all present, and the defendant. Proceed.

Mr. Kobayashi: If the Court please, at this time, before proceeding, may I at this time renew my motion for a directed verdict at the end of the defendant's case, on [45] the grounds heretofore stated.

The Court: Do you want the jury excused?

Mr. Kobayashi: No, your Honor.

The Court: You may proceed.

Mr. Kobayashi: First, that there is a fatal variance between the allegation and the proof. Secondly, that there was introduced in evidence that which was inadmissible, that is the evidence—the testimony of Police Officers Guigni and Schwartzman. Their testimony as to the finding of certain sums of money before the Prosecution had by direct or circumstantial evidence proven—made out a prima facie case of larceny. My understanding of the law is that that evidence is inadmissible, and, Third, on the ground that there is no evidence at all here upon which to base a conviction of larceny.

The Court: Any other grounds?

Mr. Kobayashi: No, your Honor.

The Court: The Court will overrule the motion for a directed verdict. Is that your motion?

Mr. Kobayashi: Yes, sir. May we save an exception?

The Court: Exception noted. Each side has rested?

Mr. St. Sure: Yes, your Honor.

The Court: You, Mr. Kobayashi, and you, Mr. St. Sure?

Mr. Kobayashi: Yes, your Honor.

The Court: The only thing that remains now then is the argument of counsel. You may proceed.

(Opening argument by counsel for the Prosecution.)

(Reply argument by counsel for the defendant.)

(Closing argument by counsel for the Prosecution.) [46]

The Court: Gentlemen of the Jury: The defendant in this case, Sable Hall, stands charged with the crime of larceny in the first degree.

You are the exclusive judges of the facts in this case and the credibility of the witnesses but the law you must take from the court as given you in these instructions to be the law notwithstanding any opinion that you may have as to what the law is or should be.

I further instruct you that larceny under our statute is defined as follows: "Larceny or theft is the feloniously taking any thing of marketable, saleable, assignable or available value, belonging to or being the property of another." Larceny is of two degrees, first and second. Larceny of property of the value of more than fifty dollars is in the first degree. All other larceny is in the second degree.

The essential elements of larceny are: (1) The

taking (2) and carrying away (3) of personal property (4) of another (5) without the owner's consent (6) with the specific intent to deprive the owner permanently of his property; and in this connection you are instructed that everyone is presumed to intend the natural and probable consequences of his own act.

I further instruct you that in order to be the subject of larceny, a thing must be owned by, or be the property, general or special, of, or belonging to, someone. That is, someone must have a property, general or special, in the thing; or have and be entitled to the possession of the thing.

In this connection, I charge you that the legal title to money in the possession and control of a person is in [47] that person and, as a matter of law, is the general property of that person.

I further instruct you that in order to be the subject of larceny, a thing must be movable, or such that it can be removed.

In this connection, I charge you that money is movable.

I further instruct you that in order to be the subject of larceny, a thing must be the subject of property and possession.

In this connection, I charge you that money is the subject of property and possession.

I further instruct you that "feloniously" as used in these instructions means a wrongful act done wilfully.

In instruct you, Gentlemen of the Jury, that the defendant may or may not testify in her own be-

half as she pleases. In this case, the defendant has not testified in her own behalf and that fact should not create any presumption of guilt against her and should not have any influence upon arriving at your verdict.

The Court further instructs you, Gentlemen of the Jury, that you are the exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor or frankness, or lack thereof, which witness or witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given the testimony of the witnesses you are authorized to consider their relationship to the parties, if any, their interest, if any, in the [48] result of the case, their temper, feeling or bias, if any has been shown, their demeanor on the witness stand, their means and opportunity of information and the probability or improbability of the story told by them.

If you find and believe from the evidence that any witness in this case has knowingly and wilfully sworn falsely to any material fact in this trial or that any witness has knowingly and wilfully exaggerated or suppressed any material fact or circumstance in this trial for the purpose of deceiving, misleading or imposing upon you, then you have a right to reject the entire testimony of such witness except insofar as the same is corroborated by other credible evidence or believed by you to be true.

I further instruct you that the burden of proof is upon the Territory and the law, independent of the evidence, presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquital must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but a doubt that you could give a reason for. A reasonable doubt is not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certain of the guilt of the accused, because everything relating to human affairs and depending upon mortal evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required [49] by law. The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty, that the defendant is guilty, and if you have such belief so formed, it is your duty to convict. You should take all the testimony and all the circumstances into account and act as you have such abiding belief the fact is.

I further instruct you that you may bring in, under the charge against the defendant in this case, one of the following verdicts as the facts and circumstances in evidence under the law as given you in these instructions may warrant: (1) Guilty as charged; (2) Not Guilty.

Gentlemen of the Jury, in connection with the Court's last instruction, the Clerk, at the Court's direction, has prepared two forms of verdict. Upon retiring you will appoint one of your members as foreman, to supervise and manage your deliberations. Upon arriving at a verdict the foreman will sign the verdict, and date the same, and after the proper form of verdict has been filled in by the signing and dating, the foreman will then notify the bailiff, and the court will then reconvene.

I will ask the Clerk now to please swear the bailiff.

(Bailiff duly sworn to take the jury in charge.)

The Court: The Court will ask the parties to clear the courtroom so that the jury may retire and conduct their deliberations.

(2:55 p.m., jury retired for their deliberations.)

3:03 P.M.

(Court reconvened.)

The Court: Gentlemen of the Jury, the [50] bailiff informs me that you have arrived at a verdict. The Court will ask the foreman to hand the verdict to the Clerk.

(Whereupon the foreman of the Jury handed to the Clerk the verdict.)

The Court: The Clerk will read the verdict.

Whereupon the Clerk read the Verdict, as follows: Criminal No. 21118. In the Circuit Court of the First Circuit, Territory of Hawaii. January

Term, A.D. 1949. Honorable John E. Parks, Third Judge presiding. Territory of Hawaii versus Sable Hall, Defendant. Verdict. We, the Jury in the above-entitled cause, find the defendant guilty as charged. Signed John T. Pope, Foreman. Honolulu, T. H., August 17, 1949.

The Court (To the defendant): Pursuant to the verdict of the jury, the Court finds and adjudges you, Sable Hall, to be guilty as charged. The verdict will be received and filed. The matter of sentence in this case will be continued until Friday at 1:30 p.m.

Mr. Kobayashi: At this time may I except to the verdict of the jury as being contrary to the law and to the evidence, and the weight of the evidence.

The Court: Yes, your exception is noted. Gentlemen of the Jury, the Court will excuse you until further. The Court thanks you for your services.

(Court adjourned.) [51]

Reporter's Certificate

I Hereby Certify that the foregoing, pages 3 to 51, both inclusive, is a true and correct transcript of my shorthand notes taken in the above-entitled cause before Honorable John E. Parks, Third Judge, Circuit Court of the First Judicial Circuit, Territory of Hawaii, on Wednesday, August 17, 1949.

/s/ ANNE R. WHITMORE,

Honolulu, T. H., November 7, 1949. [52]

Friday, September 9, 1949—1:30 o'clock p.m.

(Upon the clerk calling the case, the following occured:)

The Court: Is there anything that you care to say before the court pronounces sentence?

Mr. Kobayashi: No, your Honor.

The Court: All right, if there is nothing further, the court would like to observe that this court has had many criminal cases, but it has never had anyone come before it with a criminal record as long nor covering as many criminal offenses as Sabel Hall. Are you familiar with the criminal record? It covers five pages of every conceivable sort of offense, larceny, prostitution, soliciting, of every conceivable sort. So if there is nothing further before the court it is the sentence of the court that you, Sabel Hall, be imprisoned in Oahu Prison at hard labor for a period of not more than ten years. Mittimus to issue forthwith.

Mr. Kobayashi: At this time we give notice of an appear; may a bond be set and mittimus stayed until Monday, so that we can take care of this by way of writ of error?

The Court: Yes.

Mr. Kobayashi: There is a bond set now, I think, if that amount is sufficient.

The Court: What is the bond?

Mr. Kobayashi: $500.00.

The Court: I don't think that is enough in view of the fact that she is from the mainland.

Mr. Kobayashi: Your Honor, she has a home here, [53] and also has a business.

The Court: What is this business?

Sabel Hall: Haberdashery.

The Court: Where is your store located?

Sabel Hall: Smith street.

The Court: What's the number?

Sabel Hall: 3031. We only been in a month and a half.

The Court: What's the name of your shop or store?

Sabel Hall: It has no name, variety shop. I only been there a month and a half, and I have not—you know, the merchandise is a little short, owing to the fact that I had to come before you on bond.

The Court: The court will set the bond in your case in the sum of $2,000.00.

Mr. Kobayashi: Well, your Honor, the difficulty that she has—I mean with all defendants—if the bond is set so high she may be deprived of her right to appeal. I believe there are some points of law that have merit that if the bond is set so high it deprives the defendant of the right of appeal.

The Court: If she has property there should be no difficulty.

Sabel Hall: I don't own any property, it is an option on a place at Nanakuli. I haven't bought it yet, because of this case.

The Court: If you don't own any property here the court is inclined to set the bond higher. [54]

Sabel Hall: I have an option on it. I have my

money up on it. I am not going away. I don't want to go to the mainland.

The Court: All right.

Mr. Kobayashi: I believe $1,000.00 is sufficient. It is awfully difficult to get a thousand dollars these days.

The Court forfeited this afternoon two bonds. They were pretty high bonds, but the defendant left, anyway.

Sabel Hall: I am not going anywhere.

Mr. Kobayashi: In that case those were paper bonds, were they not? If the bond is set so high, it is impossible for her to get it.

The Court: Well, I don't want to deprive her of her right to appeal and go out on bond, but I do feel that since she is from the mainland, and in view of her record, and the fact that the court sentenced her to ten years, I do not think it would be safe to allow her to be on bond for less than $2,000.00. In fact, I am hesitant about making it that low.

Mr. Kobayashi: May the mittimus be stayed until Monday? The bondsman is in court. Can we have the mittimus stayed until Monday so that she can raise this money?

The Court: The court will stay the mittimus until Monday, and if you get yourself involved in any further difficulty the court will take that matter up at any time in the future, or revoke the stay of mittimus. You understand? [55]

Mr. Kobayashi: Can she have unil Monday noon?

The Court: All right. Monday, we will make it at 1:30 p.m.

(Whereupon the matter having been concluded, the court proceeded to other business.)

Reporter's Certificate

First Circuit Court,
Territory of Hawaii—ss.

I certify the above to be a true and correct transcript of the proceedings in the matter of Territory of Hawaii, vs. Sabel Hall, sentence, on September 9, 1949, before the Hon. John E. Parks, Circuit Judge, Honolulu, T. H.

/s/ SIDNEY MINNS.

Honolulu, T. H., November 7, 1949. [56]

[Title of Supreme Court and Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the Supreme court, of the Territory of Hawaii, do hereby certify that the documents listed in the index to the certified record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause are certified copies of the originals on file in the above court, including the transcript of testimony No. 1105, which is a certified copy of the original on file in above court and cause in accordance with the certificate of the reporters attached

thereto who reported said case. I further certify that all documents listed in said index are attached hereto.

I further certify that the cost of the foregoing transcript of record to the United States Court of Appeals for the Ninth Circuit has been paid by the attorney for the plaintiff in error herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the supreme court of the Territory of Hawaii, at Honolulu, this 8th day of Sept., 1952.

[Seal] /s/ LEOTI V. KRONE,
Clerk.

[Endorsed]: No. 13,536. United States Court of Appeals for the Ninth Circuit. Sable Hall, Appellant, vs. Territory of Hawaii, Appellee. Transcript of Record. Appeal from the Supreme Court, Territory of Hawaii.

Filed September 10, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13536

TERRITORY OF HAWAII,
Defendant in Error,

vs.

SABLE HALL,
Plaintiff in Error.

STATEMENT OF POINTS RELIED UPON AND DESIGNATION OF RECORD

Comes now Sable Hall, by her attorney, J. Donovan Flint, and hereby adopts her assignments of error appearing in the Transcript of Record as the points upon which she intends to rely on appeal, and designates the entire Transcript on appeal as set forth in the Praecipe filed with the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, Territory of Hawaii, this 26th day of September, 1952.

SABLE HALL,
Plaintiff in Error,

By /s/ J. DONOVAN FLINT,
Her Attorney.

[Endorsed]: Filed Oct. 1, 1952.

No. 13538

United States Court of Appeals

for the Ninth Circuit.

ATLAS ASSURANCE COMPANY, LTD., a Corporation; AETNA INSURANCE COMPANY, a Corporation; THE HOME INSURANCE COMPANY, a Corporation; PROVIDENCE a Corporation; NATIONAL UNNON FIRE INSURANCE COMPANY, a Corporation; and NIAGARA FIRE INSURANCE COMPANY, a Corporation,

Appellants.

vs.

DARBY MILLS, INC., a Corporation, and ALEX SHULMAN, Doing Business as Alex Shulman Co.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Montana.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-12-52

No. 13538

United States
Court of Appeals
for the Ninth Circuit.

ATLAS ASSURANCE COMPANY, LTD., a Corporation; AETNA INSURANCE COMPANY, a Corporation; THE HOME INSURANCE COMPANY, a Corporation; PROVIDENCE a Corporation; NATIONAL UNNON FIRE INSURANCE COMPANY, a Corporation; and NIAGARA FIRE INSURANCE COMPANY, a Corporation,

Appellants.

vs.

DARBY MILLS, INC., a Corporation, and ALEX SHULMAN, Doing Business as Alex Shulman Co.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Montana.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-12-52

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

MURPHY, GARLINGTON & PAULY,

Missoula, Montana;

WALCHLI, KORN & WARDEN,

Kalispell, Montana,

For Plaintiffs and Appellees.

SMITH, BOONE & RIMEL,

Missoula, Montana,

For Defendants and Appellants.

In the District Court of the United States in and for the District of Montana

No. 566

DARBY MILLS, INC., a Corporation, and ALEX SHULMAN, Doing Business as ALEX SHULMAN CO.,

Plaintiffs,

vs.

ATLAS ASSURANCE COMPANY, LTD., a Corporation, AETNA INSURANCE COMPANY, a Corporation, NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation, THE HOME INSURANCE COMPANY, a Corporation, PROVIDENCE WASHINGTON INSURANCE COMPANY, a Corporation, NATIONAL UNION FIRE INSURANCE COMPANY, a Corporation, and NIAGARA FIRE INSURANCE COMPANY, a Corporation,

Defendants.

COMPLAINT

Come now the plaintiffs in the above-entitled action and for cause complain and allege:

I.

That at all times herein mentioned the plaintiff, Darby Mills, Inc., was, ever since has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Montana,

with its principal place of business at Darby, in the County of Ravalli, State of Montana.

II.

That at all times herein mentioned the defendant, Atlas Assurance Company, Ltd., was, ever since has been and now is a corporation duly organized and existing under the laws of England, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

III.

That at all times herein mentioned the defendant, Aetna Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of Connecticut, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

IV.

That at all times herein mentioned the defendant, New Hampshire Fire Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of New Hampshire, and duly authorized to do and

actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

V.

That at all times herein mentioned the defendant, The Home Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of New York, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

VI.

That at all times herein mentioned the defendants, Providence Washington Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of Rhode Island, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

VII.

That at all times herein mentioned the defendant, National Union Fire Insurance Company, was, ever

since has been and now is a corporation duly organized and existing under the laws of the State of Pennsylvania, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

VIII.

That at all times herein mentioned the defendant, Niagara Fire Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of New York, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write insurance policies in the State of Montana.

IX.

That at the time of the issuance of the various fire insurance policies herein referred to, and sued upon, by the various defendants as herein set forth, the plaintiff, Darby Mills, Inc., was the owner of the property described in and covered by each of said insurance policies, which property was then and there situated at Conner in Ravalli County, State of Montana, and that the property for which loss by fire is claimed in this action consisted of machinery and equipment situated in the plaintiff's, Darby

Mills, Inc., sawmill at Conner in Ravalli County, Montana, and was insured by the seven defendant insurance companies herein named in the aggregate sum of $12,500.00, as shown in Form 78-B attached to each of said policies and forming an express part thereof.

X.

That on or about January 28, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, Atlas Assurance Company, Ltd., of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, Atlas Assurance Company, Ltd., bore to the total amount for which said property was insured, said defendant, Atlas Assurance Company, Ltd., by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. S856533 in the sum of $5,000.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Atlas Assurance Company, Ltd., to which insurance policy there was attached Standard Form 78-B (July 1950) as per copy thereof hereto attached, marked Exhibit "A" and hereby made a part hereof. That said policy was issued for a period of one year from its date

and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of, except that by endorsement made on said policy on or about November 3, 1950, the limit of liability under said policy changed the pro-rata proportion from $5,000.00/27,500.ths of each of the amounts specified, to $5,000.00/26,300.ths of each of the amounts specified. That since said loss the said defendant, Atlas Assurance Company, Ltd., has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XI.

That on or about January 28, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, Aetna Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, Aetna Insurance Company, bore to the total amount for which said property was insured, said defendant, Aetna Insurance Company, by and through its agent and representative, Urton and Company of Mis-

soula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 25-25827 in the sum of $5,000.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Aetna Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "A" and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of, except that by endorsement made on said policy on or about November 3, 1950, the limit of liability under said policy changed the pro-rata proportion from $5,000.00/27,500.ths of each of the amounts specified, to $5,000.00/26,300.ths of each of the amounts specified. That since said loss the said defendant, Aetna Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XII.

That on or about January 28, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, New Hampshire Fire Insur-

ance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, New Hampshire Fire Insurance Company, bore to the total amount for which said property was insured, said defendant, New Hampshire Fire Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 1-66-19 in the sum of $5,000.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said New Hampshire Fire Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "A" and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of, except that by endorsement made on said policy on or about November 3, 1950, the limit of liability under said policy changed the pro-rata proportion from $5,000.00/27,500.ths of each of the amounts specified, to $5,000.00/26,300.ths

of each of the amounts specified. That since said loss the said defendant, New Hampshire Fire Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XIII.

That on or about January 28, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, The Home Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, The Home Insurance Company, bore to the total amount for which said property was insured, said defendant, The Home Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 1070 in the sum of $5,000.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Home Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "A"

and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of, except that by endorsement made on said policy on or about November 3, 1950, the limit of liability under said policy changed the pro-rata proportion from $5,000.00/27,500.ths of each of the amounts specified, to $5,000.00/26,300.ths of each of the amounts specified. That since said loss the said defendant, The Home Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XIV.

That on or about November 3, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, Providence Washington Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, Providence Washington Insurance Company, bore to the total amount for which said prop-

erty was insured, said defendant, Providence Washington Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 821411 in the sum of $2100.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Providence Washington Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "B" and hereby made a part hereof. That said Policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of. That since said loss the said defendant, Providence Washington Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XV.

That on or about November 3, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, National Union Fire Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is

well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, National Union Fire Insurance Company, bore to the total amount for which said property was insured, said defendant, National Union Fire Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 571348 in the sum of $2100.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said National Union Fire Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "B" and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of. That since said loss the said defendant, National Union Fire Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XVI.

That on or about November 3, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, Niagara Fire Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, Niagara Fire Insurance Company, bore to the total amount for which said property was insured, said defendant, Niagara Fire Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 24977 in the sum of $2100.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Niagara Fire Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "B" and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of. That since said loss the said defendant, Niagara Fire Insurance Company, has picked up said policy and the plaintiffs do not now have possession

thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XVII.

That the firm of Urton and Company at Missoula, Montana, was the duly authorized agent for each of said defendant insurance companies, and as such agent was authorized and empowered to receive applications, to take risks for insurance and to make out, deliver and endorse policies of insurance on property for the plaintiffs, and each of them, as well as others, against loss or damage by fire, and to collect and receive premiums therefor, and to make oral agreements for insurance to take effect prior to the issuance of the policy or making endorsements thereon. That each of said insurance policies herein referred to were made, issued and delivered by each of said respective defendant insurance companies to the plaintiff, Darby Mills, Inc., by and through their said agent and representative, Urton and Company of Missoula, Montana; and that at all times in this Complaint mentioned said agent and representative, Urton and Company, had its office in Missoula, Montana, and represented itself to be and was in fact the insurance agent for each of said defendant companies.

XVIII.

That on the 15th day of December, 1950, the plaintiff, Darby Mills, Inc., entered into an agreement with Alex Shulman Co., a co-partnership of Somers,

Montana, for the sale by said Darby Mills, Inc., to said Alex Shulman Co., of all the machinery and equipment situated in the sawmill belonging to Darby Mills, Inc., at Conner, Montana, being the machinery and equipment designated in and covered by each of said insurance policies so issued by each of the defendants as herein set forth. That as a part of said Sales Agreement above referred to between the plaintiff Darby Mills, Inc., and Alex Shulman Co. it was agreed between the seller and purchaser that all insurance policies then in force covering said machinery and equipment be endorsed to show such sale and to provide protection against loss or damage by fire to both said seller and said buyer as their respective interest might appear at the time of any loss or damage sustained thereunder.

XIX.

That pursuant to said agreement of sale and on the same day, to wit, December 15, 1950, the plaintiff, Darby Mills, Inc., the insured named in each of said policies, requested and instructed Urton and Company at Missoula, Montana, as the agent of each of said defendant insurance companies, to make such endorsement above referred to on each of said insurance policies insofar as said machinery and equipment was concerned, which endorsement was to provide that any loss or damage sustained under said policies be made payable to Darby Mills, Inc., and to Alex Shulman Co. as their respective interests might appear. That said Urton and Company,

as such agent and representative of each of said insurance companies, then and there agreed to so endorse each of said policies in keeping with the request of said insured, Darby Mills, Inc., and assured said Darby Mills, Inc., that the matter would be taken care of, and the plaintiff, Darby Mills, Inc., relied upon the agreement of said agent for said defendants that each of said policies would be so endorsed to protect both said seller and said purchaser of said machinery and equipment so covered by said policies.

XX.

That on or about January 2, 1951, the following described items of machinery and equipment so covered by said defendants' insurance policies, were still situated in said plaintiff's, Darby Mills, Inc., sawmill at Conner, Montana, and were wholly destroyed by fire.

XXI.

That the items of property above referred to so destroyed by fire were, and the value thereof at the time of said fire, was as is itemized and set forth in Exhibit "C" attached hereto and by this reference made a part hereof, and that by reason of such destruction of said property as aforesaid the plaintiffs suffered loss and sustained damages in the sum of $3460.24.

XXII.

That on or about January 3, 1951, immediately after the occurrence of said fire, the plaintiffs notified each of said defendant insurance companies, as

required by the terms of said policies, of such fire and loss by notifying said defendants' agent and representative, Urton and Company, at their office in Missoula, Montana. That immediately thereafter, one Harry E. Noel, the adjuster, agent and representative of each of said defendant insurance companies, with his office at Missoula, Montana, made an investigation of the premises and of said fire loss at Conner, Montana, under the said policies so issued and endorsed, covering said machinery and equipment. That on or about January 9, 1951, and within 60 days of said loss, the plaintiffs furnished and delivered to said Harry E. Noel, as such adjuster and agent for said defendant insurance companies, an itemized written list and statement of the property so destroyed by fire, copy of which is shown in Exhibit "C" and attached hereto and by this reference made a part hereof, and otherwise furnished information and proof of said loss to said Harry E. Noel as such agent and adjuster for said defendant companies, furnishing him with all of the facts within the knowledge of the plaintiffs as to the time and place of said fire and the ownership of said property, the value thereof and the fact that said property so destroyed or damaged was at the time of said fire situated in exactly the same place and location as the property was in at the time of the issuance of said insurance policies; and that said plaintiffs otherwise furnished the said defendants' agent and adjuster, Harry E. Noel, all information required by him under said policies, and the plain-

tiffs otherwise performed all of the conditions of said policies on plaintiffs' part to be kept and performed.

XXIII.

By the terms of said Sales Agreement the purchaser Alex Shulman Co. agreed to pay Darby Mills, Inc., the sum of $3375.00 at the time of the making of said Agreement, and the balance of $3375.00 on January 15, 1951. That at the time of said fire on January 2, 1951, there remained unpaid and there is now due and unpaid to the plaintiff, Darby Mills, Inc., on said sale price, under said Sales Agreement, of said machinery and equipment, the sum of $3375.00. That the plaintiff, Darby Mills, Inc., at the time of said fire loss, had an interest in said property and said insurance covering the same to the extent of $3375.00, and that the plaintiff, Alex Shulman Co., had an interest therein to the extent of the value of the property so destroyed or damaged by said fire, subject to the claim of the plaintiff, Darby Mills, Inc., therein.

XXIV.

That on or about July 30, 1951, and subsequent to said fire loss, the co-partnership of Alex Shulman Co. was dissolved and as part of said partnership dissolution all of said partnership interest in and to said personal property so purchased from plaintiff, Darby Mills, Inc., and said partnership's right in and to all choses in action arising from the fire loss herein complained of were duly and regularly transferred to the plaintiff, Alex Shulman,

who has since continued to do and is now doing business as Alex Shulman Co.

XXV.

That said defendants, or any of *the,* have not paid the said loss or damage herein complained of, or any part thereof, and that the same is now due, owing and unpaid from said defendants to the plaintiffs herein.

Wherefore, the plaintiffs pray judgment against the defendants herein:

1. For the sum of $3460.24, together with interest thereon at the rate of 6% per annum from March 2, 1951.

2. For plaintiffs' costs and disbursements herein.

3. For such other and further relief as may be just and proper in the premises.

MURPHY, GARLINGTON & PAULY,
Attorneys for Plaintiff, Darby Mills, Inc.

WALCHLI, KORN & WARDEN,
Attorneys for Plaintiff, Alex Shulman Co.

State of Montana,
County of Flathead—ss.

D. J. Korn, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiffs in the above-entitled action and makes this verification for and on behalf of said plaintiffs for the reason and upon the ground that none of the plaintiffs, nor any officer thereof, is a resident of the State of Montana, where this affiant resides and this action is brought; that affiant has read the foregoing Complaint, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

D. J. KORN.

Subscribed and sworn to before me this 31st day of December, 1951.

[Seal] MERRITT N. WARDEN,
Notary Public for the State of Montana, Residing at Kalispell, Montana.

My commission expires January 22, 1952.

Service of copy acknowledged.

[Endorsed]: Filed February 7, 1952.

[Title of District Court and Cause.]

ANSWER

Defendants, for answer to plaintiffs' complaint, allege:

I.

Admit the allegations of Paragraphs I to VIII, inclusive, of plaintiffs' complaint.

II.

Admit the allegations of Paragraph IX of the complaint, but in this connection specifically allege that at the time of the fire mentioned in the complaint, the plaintiff Darby Mills, Inc., had no right, title or interest of any kind in the property described in Exhibit "C" attached to the complaint.

III.

Admit the allegations of Paragraphs X to XVI, inclusive, except: Defendants deny that any of the machinery and equipment which was destroyed by fire as alleged in the complaint, was covered by any of the policies described in Paragraphs X to XVI, inclusive. In this connection allege that prior to the date of the fire alleged in the complaint, the plaintiff Darby Mills, Inc., sold all of the equipment and machinery described in the complaint and that at the time of the fire the said Darby Mills, Inc., had no insurable interest in the said property, or any part thereof, and deny that insofar as the policies mentioned in said Paragraphs X to XVI, inclusive, purported to cover the property alleged to have been destroyed by fire, that said policies were not in good standing. Defendants admit that the following policies were canceled and delivered to the companies issuing them, to wit:

Providence Washington Insurance Company, Policy No. 821411;

National Union Fire Insurance Company, Policy No. 571348;

Niagara Fire Insurance Company, Policy No. 24977,

but deny that the remaining policies described in the complaint were picked up or are in possession of the companies issuing them.

IV.

Admit that the firm of Urton and Company at Missoula, Montana, was an agent for the insurance companies named in the complaint and had power to receive applications and take risks for insurance, and to make out and endorse policies of insurance on property against loss by fire. Admit that said Urton and Company, had power to collect and receive premiums. Admit that Urton and Company, as the agents of the defendants, did issue the policies described in Paragraphs X to XVI of the complaint. Deny each and every allegation, matter and thing contained in Paragraph XVII of the complaint not herein specifically admitted, and specifically deny that Urton and Company had power to make oral assignments of an interest in insurance policies.

V.

Deny the allegations of Paragraph XVIII and XIX of said complaint, except as qualified in Paragraph XVIII hereof.

VI.

Admit that on or about January 2, 1951, there was a fire at the sawmill at Connor, Montana, and that the buildings were destroyed, and that some machinery and equipment was destroyed or damaged. State that the defendants have no knowledge or information sufficient to form a belief with respect to the exact items of property which were damaged or destroyed or with respect to the value of such items. Deny each and every allegation, matter and thing set out in Paragraph XX and XXI of said complaint not herein specifically admitted or denied upon information and belief.

VII.

With respect to the allegations of Paragraphs XXII of the complaint, the defendants deny all the allegations thereof except as herein qualified or admitted.

Defendants allege that on or about January 3, 1951, the plaintiff Darby Mills, Inc., notified Urton and Company that there had been a fire at the sawmill of said plaintiff at Connor, Montana. Thereafter, Harry Noel, an adjuster for the defendant, visited the scene of the fire and investigated the same. That on or about April 17, 1951, the plaintiff Darby Mills, Inc., furnished to the defendants a proof of loss, which said proof described buildings which were covered by the insurance policies described in the complaint. That thereafter the defendants paid to Darby Mills, Inc., the entire amount shown on the proof of loss furnished by said Darby

Mills, Inc. That the said Darby Mills, Inc., at no time claimed any loss or damage by reason of the destruction or damage done to the personal property described in Exhibit "C" attached to the complaint, or made any proof of loss with respect thereto. That on or about January 9, 1951, the plaintiff, Alex Shulman, addressed a letter to Harry Noel and enclosed in said letter a list of equipment claimed to have been destroyed in the fire. That such list was identical with Exhibit "C" attached to the complaint, except that it did not contain any of the figures shown in said Exhibit "C" as to the value of said items. That no further or other proof of loss was submitted to the defendants, or either of them, by said plaintiff Alex Shulman.

VIII.

Admit that Darby Mills, Inc., and Alex Shulman Co., agreed to sell and buy certain machinery and equipment. In this connection allege that the agreement was reduced to writing. That a copy of said agreement is attached hereto, marked Exhibit 1, and by this reference made a part hereof. Deny that the agreement between the said plaintiffs was other or different than that disclosed in Exhibit 1. Deny that defendants have sufficient knowledge or information to form a belief with respect to whether Alex Shulman has paid Darby Mills, Inc., the balance of $3,375.00.

Deny each and every allegation, matter and thing contained in Paragraph XXIII of the complaint not herein admitted or denied upon information

and belief, and specifically deny that the plaintiff, Darby Mills, Inc., had any interest of any kind in the property described in Exhibit "C" attached to the complaint after December 15, 1950.

IX.

Deny that the defendants have any knowledge or information sufficient to form a belief with respect to the allegations of Paragraph XXIV of said complaint.

X.

Admit that defendants have not paid any amount to plaintiffs by reason of the alleged damage to the machinery and equipment described in the complaint.

Deny each and every allegation, matter and thing contained in Paragraph XXV of plaintiffs' complaint.

For Further Answer to Plaintiffs' Complaint, the Defendants Allege

I.

That each and all of the policies of insurance described in the plaintiffs' complaint contained the following provisions, to wit:

> "Assignment of this policy shall not be valid except with the written consent of the Company."
>
> "No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added thereto."

That the defendants did not, nor did any one of them, consent in writing to the assignment in whole or in part of all or any one of the policies described in the complaint, or any thereof.

II.

That on or about the 15th day of December, 1950, the plaintiff Darby Mills, Inc., by an instrument in writing sold unto Alex Shulman Co. all of the machinery and equipment described in the policies of insurance set forth in plaintiffs' complaint. That a copy of said writing is annexed hereto, marked Exhibit 1[1], and by this reference made a part hereof. That by virtue of said instrument, the plaintiff Darby Mills, Inc., ceased to have any interest in the property described in the said policies, and in the complaint, on the 15th day of December, 1950, and did not, on January 2, 1951, the time of the fire described in the complaint, have any insurable interest in the said property, or any part thereof.

III.

That the plaintiff, Alex Shulman Co., is not now, and was not at any of the times mentioned in the complaint, an insured under the insurance policies described in the complaint, or any of them.

For Further Answer to Plaintiffs' Complaint, the Defendants Allege

I.

That each and all of the policies described in the complaint contain the following provision:

[1See Plaintiffs' Exhibit No. 1 in evidence, pages 96 to 99 of this printed record.]

"The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed, and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof, and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described, and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged."

That the plaintiff Darby Mills, Inc., did not, within sixty days after the 2nd day of January, 1951, or at all, make any claim to the defendants or any of them by reason of a loss of the personal property described in the complaint, and did not furnish to the defendants, or any of them, any sworn proof of loss of any kind with respect to said machinery and equipment.

III.

That the plaintiff Alex Shulman did not, within sixty days after the said fire, or at all, furnish any statement of any kind in the nature of a proof of loss except the letter and list, copies of which are attached hereto, marked Exhibits 2 and 3, and by reference made a part hereof.

Wherefore, having fully answered, defendants pray that plaintiffs take nothing by their complaint, and that the defendants have judgment for their costs herein expended.

SMITH, BOONE & RIMEL,

/s/ RUSSELL E. SMITH,
Attorneys for Defendant.

State of Montana,
County of Missoula—ss.

Russell E. Smith, being first duly sworn, on his oath deposes and says: That he is one of the attorneys for the defendants in the above-entitled action,

and makes this verification for and on behalf of the defendants, for the reason that there is no officer or agents of said defendant corporations within the County of Missoula, State of Montana, wherein affiant resides and maintains his office; that affiant has read the foregoing Answer and knows the contents thereof, and that the matters, facts and things therein stated are true to his best knowledge, information and belief.

/s/ RUSSELL E. SMITH.

Subscribed and Sworn to before me this 14th day of March, 1952.

[Seal] /s/ MARTHA ALSTEENS,
Notary Public for the State of Montana, residing at Missoula, Montana.

My Commission expires June 5, 1954.

EXHIBIT 2

Alex Shulman Co.
Somers, Montana

Seattle, Washington
January 9, 1951

Mr. Harry Noel,
General Adjustment Bureau,
601 Montana Building,
Missoula, Montana.

Dear Mr. Noel:

Enclosed please find list of machinery and material destroyed by fire about 2 a.m. January 2, 1951, in Darby Sawmill located at Conner, Montana.

We have been informed by our dismantling and moving contractor, Mr. H. Hunt of Spokane, Washington, that all of the items listed were damaged by the fire to such an extent that their only present value is as scrap.

We have assembled the information on the enclosed list from the following sources:

1. Appraisal made for Darby Mills, Inc., by Harper, Chambers & Bean on July 1, 1950.

2. Preliminary inventory taken by the writer and Mr. Joe Kraft on December 16, 1950, the day after completion of purchase.

3. Deducting from item 2, above, all of the machinery and materials which had been sold and delivered prior to January 2, 1951, or which had been moved to our warehouse at Somers, Montana.

We shall be glad to furnish any further information required. Your early attention will be greatly appreciated.

Very truly yours,

ALEX SHULMAN CO.

/s/ ALEX SHULMAN.

as r

1. 1 Wash. Iron Works 100 HP Steam Engine with Twin Cylinders 11x14 (formerly used to drive entire mill except carriage).

2. 1 Soule Steam Engine (formerly used to drive carriage only).

3. 150′ Log Haul Chain.

4. 1 Log Haul Drive.

5. 1 M & C Engine for Log Haul Drive.

6. 1 Steel Drum 26″ long; 13″ diameter; with 32″ gear and 2 15/16″ shaft.

7. 1 Drag Saw with Steam operated Engine.

8. 1 set Saw Husks, Top Saw and Bottom Saw; each with 2 15/16″ Arbor, 7′ long, 6″ collar; Ball Bearings.

9. 1 Hand Cross-Cut Saw.

10. Steam driven Log Nigger.

11. Steam Compressor (for Log Nigger).

12. 1 Hydraulic Cylinder (formerly used for Log Loader & Log Nigger).

13. 1 Hydraulic Cylinder (recently overhauled, for use as spare).

14. 1 set Refuse Chain Driver Gears.

15. 1 7½ size Deane Steam Pump.

16. 30′ 18″ H/D Endless Belt.

17. 1 lot Pulleys, Shafting, Boxing, Belting, Gears, etc.

18. 1 lot Miscellaneous unlisted small items.

19. 1 lot Pipe:

234′	1½″
187′	1″
60′	2″
41′	2½″
65′	3″
108′	4″

Receipt of copy acknowledged.

[Endorsed]: Filed March 17, 1952.

[Title of District Court and Cause.]

VERDICT

I.

Did Darby Mills, acting through J. Ward Rukgaber, request James Jenkins as agent of the defendant companies to agree to a transfer of the insurance covering the saw mill machinery and equipment to Alex Shulman?

Answer: Yes.

II.

If your answer to the above question is Yes, then answer the following question:

Did James Jenkins agree to the transfer of the insurance to Alex Shulman?

Answer: Yes.

III.

If your answer to each of the above questions is Yes, then answer the following question:

What was the actual cash value of the machinery and equipment destroyed in the fire?

Answer: $2,791.15.

/s/ DONALD D. FORNUM,
Foreman.

[Endorsed]: Filed March 26, 1952.

In the District Court of the United States for the District of Montana, Missoula Division

No. 566

DARBY MILLS, INC., a Corporation, and ALEX SHULMAN, Doing Business as ALEX SHULMAN CO.,

Plaintiff,

vs.

ATLAS ASSURANCE COMPANY, LTD., a Corporation, AETNA INSURANCE COMPANY, a Corporation, NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation, THE HOME INSURANCE COMPANY, a Corporation, PROVIDENCE WASHINGTON INSURANCE COMPANY, a Corporation, NATIONAL UNION FIRE INSURANCE COMPANY, a Corporation, and NIAGARA FIRE INSURANCE COMPANY, a Corporation,

Defendants.

JUDGMENT

The above-entitled cause came on for trial before the Court, sitting with a jury, at Missoula, Montana, on March 24, 1952, at 10:00 o'clock a.m. The Plaintiffs were represented by their counsel, Messrs. Walchli, Korn and Warden of Kalispell, Montana, and Murphy, Garlington and Pauly of Missoula, Montana; the Defendants were represented by their counsel, Messrs. Smith, Boone and Rimel of Missoula, Montana. After the jury was duly empanelled and sworn, witnesses were sworn and evidence was introduced on behalf of the Plaintiffs and the Defendants. At the close of the evidence, the Defend-

ants moved the Court for an Order directed a verdict in favor of the Defendants and against each of the Plaintiffs, which Motion was by the Court granted as to the Plaintiff Darby Mills, Inc., and reserved for later decision as to the Plaintiff Alex Shulman.

The Court, with consent of counsel, submitted the cause to the jury for decision by a special verdict, in the form of the following written interrogatories, to which the jury made the following answers:

(1) Did Darby Mills, Inc., acting through J. Ward Rukgaber, request James Jenkin, as agent of the Defendant insurance companies, to agree to a transfer of the insurance covering the sawmill machinery and equipment to Alex Shulman?

Answer: Yes.

(2) If your answer to the above interrogatory is yes, then answer the following: Did James Jenkin agree to the transfer of this insurance to Alex Shulman?

Answer: Yes.

(3) If your answer to each of the above interrogatories is yes, then answer the following: What was the actual cash value of the machinery and equipment destroyed in the fire?

Answer: $2,791.15.

In submitting the cause to the jury upon the foregoing interrogatories, the Court gave additional explanation and instruction, to which counsel took no exception. After argument of counsel and instruction by the Court, the jury retired to deliberate upon its verdict, and thereafter rendered its verdict as hereinabove set forth.

Now, Therefore, being fully advised in the premises, the Court hereby orders and renders judgment in the above-entitled cause in favor of the Plaintiff Alex Shulman and against the Defendants separately as hereinafter set forth, including Plaintiff's costs of action, which are fixed and taxed in the sum of $159.30, making a total judgment in favor of the Plaintiff in the sum of $2,950.45.

It Is Further Ordered and Adjudged, that the said judgment be, and the same is, apportioned between said Defendants in the separate amounts hereinafter set forth, in proportion to their respective shares of the total insurance coverage as determined by the allegations in the Plaintiffs' Complaint and the admissions in the Defendants Answer thereto, to wit:

Atlas Assurance Company, Ltd.	$560.92
Aetna Insurance Company	560.92
New Hampshire Fire Insurance Company	560.92
The Home Insurance Company	560.92
Providence Washington Insurance Company	235.59
National Union Fire Insurance Company	235.59
Niagara Fire Insurance Company	235.59
Total	$2,950.45

Done in Open Court this 2nd day of April, 1952.

/s/ WILLIAM D. MURRAY,
Judge.

[Endorsed]: Filed April 2, 1952.
Entered and Docketed April 3, 1952.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between the parties hereto that all of the policies of insurance written by the separate defendants in this cause are identical in form and substance except for the names of the companies and the amounts of insurance involved, and that Plaintiffs' Exhibit No. 4, which is designated as a part of the record on appeal, contains exactly the same terms as all of the policies involved in this case.

Dated this 12th day of August, 1952.

SMITH, BOONE & RIMEL,
Attorney for Defendants-
Appellants.

WALCHLI, KORN &
WARDEN,

MURPHY, GARLINGTON
& PAULEY,
Attorney for Plaintiffs-
Appellees.

PLAINTIFFS' EXHIBIT No. 4

No. 1070 Stock Company
Renewal of No. 1054

The Home Insurance Company
New York
New York

Organized 1853

Member of the Underwriters Board of the Pacific

Amount: $5,000.00.
Rate: 9.094.
Premium: $454.70.
Total Premium: $454.70.
Extended Coverage:*

Rate:
Premium: $

*No insurance attaches in connection with Extended Coverage Perils unless "Rate" and "Premium" is specified above and Extended Coverage endorsement is attached to this policy.

In Consideration of the Provisions and Stipulations herein or added hereto and of Four Hundred Fifty-four and 70/100 Dollars Premium this company, for the term of One Year from the 28th day of January, 1950, to the 28th day of January, 1951, at noon, Standard Time, at location of property involved, to the amount not exceeding Five Thousand and no/100 Dollars, does insure Darby Mills, Inc., and legal representatives, to the extent of the

Plaintiffs' Exhibit No. 4—(Continued)

actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all Direct Loss by Fire, Lightning and by Removal From Premises Endangered by the Perils Insured Against in This Policy, Except as Hereinafter Provided, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not

Plaintiffs' Exhibit No. 4—(Continued)

be valid unless countersigned by the duly authorlized Agent of this Company at Missoula, Mont. 17075-72.

/s/ HAROLD V. SMITH,
President.

/s/ W. BEYER,
Secretary.

Countersigned this 28th day of January, 1950.

URTON CO.

By /s/ J. G. JENKIN,
Agent.

Concealment, fraud.

This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property.

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included.

This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by (a) enemy attack by armed forces, including action taken by miltary, naval or air forces in resisting an actual or an immediately

Plaintiffs' Exhibit No. 4—(Continued)

impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other Insurance.

Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects.

Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Plaintiffs' Exhibit No. 4—(Continued)

Added provisions.

The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions.

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy.

This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Plaintiffs' Exhibit No. 4—(Continued)

Mortgagee interests and obligations.

If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability.

This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs.

The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the dam-

Plaintiffs' Exhibit No. 4—(Continued)

aged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examina-

Plaintiffs' Exhibit No. 4—(Continued)

tion all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.

In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options.

It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or re-

Plaintiffs' Exhibit No. 4—(Continued)

place the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment.

There can be no abandonment to this Company of any property.

When loss payable.

The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit.

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation.

This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

Standard Forms Bureau Form 78-B (April 1948)
Not for California

Attached to and forming part of Policy No. 1070 of the (Name of insurance company) Home Insur-

Plaintiffs' Exhibit No. 4—(Continued)

ance Company. Issued to (Name of insured) Darby Mills, Inc. The property covered hereunder is used principally as (Describe principal occupancy) Saw Mill, Planer Buildings, Equipment and Stock. Agency at (City or town or state) Missoula, Montana, Dated January 28, 1950. This policy covers the following described property, all situated Conner, Montana, and Darby, Montana.

See insuring clause below.

This policy being for $5,000.00 covers its pro rata proportion, namely 5,000.00/48,000ths of each of the amounts specified and inserted in the blanks immediately proceeding the following items.

Item No.	Description or Location	Building	Furniture-Fixtures-Machinery-Equipment	Stock
	Conner, Montana (West Fork)			
1.	Sawmill	$ 2,000.00	$12,500.00	
2.	Blacksmith Shop (Frame)	25.00	150.00	
3.	Machine Shop (Frame)	1,500.00	1,000.00	$700.00
4.	Oil House (Frame)	100.00		125.00
5.	Bunkhouse (Frame-Brick Ch.)	1,000.00		
6.	Bunkhouse (Same as No. 5)	300.00		
7.	Bunkhouse (Same as No. 5)	300.00		
8.	Cook House (Frame-S. P. Ch.)	2,000.00	400.00	
9.	Shed and Garage (Frame)	500.00		
10.	Dwelling (Frame-Brick Ch.)	2,400.00		
11.	Dwelling (Frame-S. P. Ch.)	1,200.00		
12.	Dwelling (Frame-Brick Ch.)	1,200.00		
	Darby, Montana			
1.	Planer (Frame)	$ 5,000.00	$15,000.00	
2.	Office (Frame)	300.00	300.00	
	Totals	$17,825.00	$29,350.00	$825.00

Plaintiffs' Exhibit No. 4—(Continued)

Paragraph No.

1. Insurance attaches hereinunder only to those items for which an amount is shown in the space provided therefor and not exceeding said amount under such item(s). For definition of terms "Building," "Equipment," "Stock," see paragraph 2 below; for extensions and exclusions see paragraphs Nos. 3 and 5 below.

2. Definition of Terms:

(I) Building: Building or structure in its entirety, including all fixtures and machinery used for the service of the building itself, provided such fixtures and machinery are contained in or attached to and constitute a part of the building; additions in contact therewith; platforms, chutes, conveyors, bridges, trestles, canopies, gangways, and similar exterior structures attached thereto and located on the above described premises, provided that if the same connect with any other building or structure owned by the named Insured, then this insurance shall cover only such portion of the same situate on the above described premises as lies between the building covered under this policy and a point midway between it and such other building or structure; also (a) awnings, signs, door and window shades and screen, storm doors and storm windows; (b) cleaning and fire fighting apparatus; (c) janitors' supplies, tools and implements; (d) materials and supplies intended for use in construction, alterations or repairs of the building. Provided, how-

Plaintiffs' Exhibit No. 4—(Continued)

ever, that property described in (a), (b), (c) and (d) immediately above must be, at the time of any loss, (1) the property of the named Insured who is the owner of the building; and (2) used for the maintenance or service of the building; and (3) contained in or attached to the building; and (4) not specifically covered under an item other than the "Building" item of this or any other policy.

(II) Equipment: Equipment and personal property of every description, and, provided the described building is not owned by the named Insured, "Tenant's Improvements and Betterments" installed or paid for by the named Insured; but excluding, (1) bullion, manuscripts, and machine shop or foundry patterns, (2) property (whether covered under this policy or not) included within the description or definition of "Stock," (3) property kept for sale, and (4) property covered under the "Building" item of this or any other policy.

(III) Stock: Stock of goods, wares and merchandise of every description, manufactured, unmanufactured, or in process of manufacture; materials and supplies which enter into the manufacture, packing, handling, shipping and sale of same; advertising material; all being the property of the named Insured, or sold but not removed (it being understood that the actual cash value of stock sold but not removed shall be the Insured's selling price); and the Insured's interest in materials, labor and charges furnished, performed on or incurred in connection with the property of others.

Plaintiffs' Exhibit No. 4—(Continued)

†3. Extension Clause: Personal property of the kind and nature covered under any item hereof shall be covered under the respective item (a) while in, on, or under sidewalks, streets, platforms, alleyways or open spaces, provided such property is located within 50 feet of the described "Building," and (b) while in or on cars and vehicles within 300 feet of the described "Building," and (c) while in or on barges and scows or other vessels within 100 feet of the described premises; provided such property is not covered by marine, inland marine or transportation insurance of any kind.

---

†Note:—When insurance under this form is "Blanket," the word "Building" in Paragraph 3 above shall be changed to "premises."

4. Trust and Commission Clause: To the extent that the named Insured shall be liable by law for loss thereto or shall prior to loss have specifically assumed liability therefor, any item of this policy covering on personal property shall also cover property of the kind and nature described in such item, at the location(s) herein indicated, held in trust, or on consignment or commission, or on joint account with others, or left for storage or repairs.

5. Exclusion Clause: In addition to property expressly excluded from coverage by any provision of this form or other endorsement attached to this policy, the following are not covered under any item of this policy and are to be excluded in the application of any "Average Clause" or "Distribu-

Plaintiffs' Exhibit No. 4—(Continued)

tion Clause": land values, gardens, trees, lawns, plants, shrubbery, accounts, bills, currency, deeds, evidences of debt, money, securities, aircraft, boats, motor vehicles.

6. Loss, if any, under each item of this policy shall be adjusted with and payable to the Insured specifically named herein unless otherwise agreed in writing by this Company.

7. Loss, if any, under item(s).....subject to all the terms and conditions of this policy, and to the written agreement, if any, between this Insurer and the following named Payee, is payable to Assured.

8. Average Clause (This Clause Void Unless Percentage Is Inserted): In event of loss to property described in any item of this policy as to which item a percentage figure is inserted in this clause, this Company shall be liable for no greater proportion of such loss than the amount of insurance specified in such item bears to the following percentage of the actual value of the property described in such item at the time of loss, nor for more than the proportion which the amount of insurance specified in such item bears to the total insurance on the property described in such item at the time of loss:

.....per cent (...%) applying to Item No.....

.....per cent (...%) applying to Item No.....

.....per cent (...%) applying to Item No.....

If this policy be divided into two or more items, the

Plaintiffs' Exhibit No. 4—(Continued)

foregoing conditions shall apply to each item separately.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

URTON CO.

By /s/ J. G. JENKIN,

Agent's Signature.

This form may be used for "Blanket" Insurance or for "Specific" Insurance.

78-B April, 1948

Provisions Referred to in and Made Part of This Form (No. 78-B)

Paragraph No.

9. Waiver of Inventory and Appraisement Clause: If any item of this policy is subject to the conditions of the Average Clause (Paragraph 8 hereof), it is also provided that when an aggregate claim for any loss to the property described in any such item of this policy is both less than Five Thousand Dollars ($5,000.00) and less than two per cent (2%) of the total amount of insurance upon the property described in such item at the time such loss occurs, it shall not be necessary for the Insured to make a special inventory or appraisement of the undamaged property, but nothing herein contained shall operate to waive the application of the Average Clause to any such loss.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

Plaintiffs' Exhibit No. 4—(Continued)

10. Excess Insurance Limitation Clauses: (I) (Applies when the insurance under this form is "Blanket.") No item of this policy shall attach to or become insurance upon any property, included within the description of such item, of others than the named Insured, which at the time of any loss is covered by insurance carried by or in the name of others, until the liability of such other insurance has first been exhausted, and shall then cover only the excess of value of such property over and above the amount payable under such other insurance, whether collectible or not. This clause shall not be applicable to property of others, for the loss of which the Insured named herein is liable by law or has prior to any loss specifically assumed liability.

(II) (Applies when the insurance under this form is "Specific.") No item of this policy shall attach to or become insurance upon any property, included within the description of such item, which at the time of any loss

(a) Is more specifically described and covered under another item of this policy, or under any other policy carried by or in the name of the Insured named herein, or

(b) Being the property of others is covered by insurance carried by or in the name of others than the Insured named herein, until the liability of insurance described under (a) or (b) has first been exhausted, and shall then cover only the excess of value of such property over and above the amount

Plaintiffs' Exhibit No. 4—(Continued)

payable under such other insurance, whether collectible or not. This clause shall not be applicable to property of others for the loss of which the Insured named herein is liable by law or has prior to any loss specifically assumed liability.

11. Tenant's Improvements and Betterments Clause: "Tenant's Improvements and Betterments" (subject to the provisions of the paragraph hereof entitled "Equipment") are covered as property of the named Insured under the "Equipment" item of this policy, regardless of whether or not the same have or will become a permanent or integral part of the buildings(s) or the property of the building owner or lessor. The amount of loss on such "Tenant's Improvements and Betterments" shall be determined on the basis of the actual cash value thereof at the time of loss, irrespective of any limitation upon the interest of the Insured therein resulting from any lease or rental agreement affecting the same. The insurance on such "Tenant's Improvements and Betterments" shall not be prejudiced, nor shall the amount recoverable for loss thereon be diminished, because of insurance covering on the same issued in the name of the owner of said building(s) or of others than the Insured named in this policy. This policy, however, shall not contribute to the payment of any loss to "Tenant's Improvements and Betterments" covered under any policy or policies issued in the name of the owner of said building(s) or of others than the Insured named in this policy.

Plaintiffs' Exhibit No. 4—(Continued)

12. Consequential Damage Assumption Clause: (To apply only if stock of merchandise, provisions or supplies in cold storage, which stock is subject to damage through change of temperature, are covered hereunder.) This Company (subject to the terms of this policy) shall be liable for consequential loss to stock of merchandise, provisions and supplies in cold storage covered hereunder caused by change of temperature resulting from total or partial destruction by any peril insured against in this policy, of refrigerating or cooling apparatus, connections or supply pipes thereof, unless such loss is specifically excluded as to any such peril by express provision of any form, rider or endorsement attached to this policy.

The total liability for loss caused by any peril insured against in this policy and by such consequential loss, either separately or together, shall in no case exceed the total amount of this policy in effect at the time of loss. If there is other insurance upon the property damaged covering the perils, or any thereof, which are insured against in this policy, this Company shall be liable only for such proportion of any consequential loss as the amount hereby insured bears to the whole amount of insurance thereon whether such other insurance covers against consequential loss or not.

13. Breach of Warranty Clause: If a breach of any warranty or condition contained in any rider attached to or made a part of this policy shall occur, which breach by the terms of such warranty or condition shall operate to suspend or avoid this

Plaintiffs' Exhibit No. 4—(Continued)

insurance, it is agreed that such suspension or avoidance due to such breach, shall be effective only during the continuance of such breach and then only as to the building, fire division, contents therein, or other separate location to which such warranty or condition has reference and in respect of which such breach occurs.

14. Subrogation Waiver Clause: This insurance shall not be prejudiced by agreement made by the named Insured releasing or waiving this Company's right of subrogation against third parties responsible for the loss, under the following circumstances only:

(I) If made before loss has occurred, such agreement may run in favor of any third party;

(II) If made after loss has occurred, such agreement may run only in favor of a third party falling within one of the following categories at the time of loss:

(a) A third party insured under this policy; or

(b) A corporation, firm, or entity (1) owned or controlled by the named Insured or in which the named Insured owns capital stock or other proprietary interest, or (2) owning or controlling the named Insured or owning or controlling capital stock or other proprietary interest in the named Insured;

(III) Whether made before or after loss has occurred, such agreement must include a release or waiver of the entire right of recovery of the named Insured against such third party.

Plaintiffs' Exhibit No. 4—(Continued)

15. Automatic Reinstatement Clauses: (a) Applying to losses not exceeding One Hundred Dollars ($100.00) under this policy: The amount of insurance hereunder involved in a loss payment of not more than One Hundred Dollars ($100.00) for this policy shall be automatically reinstated.

(b) Applying to losses in excess of One Hundred Dollars ($100.00) under this policy: In the event of any loss payment under this policy in excess of One Hundred Dollars ($100.00) the amount paid shall be deemed reinstated and this policy automatically reinstated to the full amount in force immediately preceding said loss, provided that the policy shall be endorsed to that effect within 30 days after the payment of loss, and the Insured shall pay to the Company the pro rata premium for the unexpired time from the date of said loss to the expiration of this policy, at the rate in force at the time of said reinstatement. This clause shall apply to each loss separately.

16. Vacancy—Unoccupancy—Cessation of Operations Clause: Unless otherwise specified by endorsement added hereto: (a) If the subject of this insurance be a manufacturing, mill, or mining plant, permission is granted to remain vacant or unoccupied or to shut down and cease operations, for a period of not to exceed sixty (60) consecutive days at any one time; or (b) If the subject of insurance be a cannery, fruit, nut or vegetable packing or processing plant, fish reduction plant, hop kiln, rice drier, beet sugar factory, cotton gin, cotton

Plaintiffs' Exhibit No. 4—(Continued)

compress or cotton seed oil mill, permission is granted to remain vacant or unoccupied for a period of not to exceed sixty (60) consecutive days at any one time, or to shut down and cease operations (but not to be vacant) for a period of not to exceed ten (10) months at any one time; (c) Except as otherwise provided in (a) and (b) immediately above, permission is granted to remain vacant or unoccupied without limit of time. Nothing herein contained shall be construed to abrogate or modify any provision or warranty of this policy requiring (1) the maintenance of watchman service; (2) the maintenance of all fire extinguishing appliances and apparatus including sprinkler system, and water supply therefor, and fire detecting systems, in complete working order; nor to extend the term of this policy.

17. Permits and Agreements Clause: Permission granted: (a) For such use of the premises as is usual or incidental to the business conducted therein and for existing and increased hazards and for change in use or occupancy except as to any specific hazard, use, or occupancy prohibited by the express terms of this policy or by any endorsement thereto; (b) To keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require; (c) For the building(s) to be in course of construction, alteration or repair, all without limit of time but without extending the term of this policy, and to build additions thereto, and this

Plaintiffs' Exhibit No. 4—(Continued)

policy under its respective item(s) shall cover on or in such additions in contact with such building(s); but if any building herein described is protected by automatic sprinklers, this permit shall not be held to include the reconstruction or the enlargement of any building so protected, without the consent of this Company in writing. This permit does not waive or modify any of the terms or conditions of the Automatic Sprinkler Clause (if any) attached to this policy.

This insurance shall not be prejudiced: (1) By any act or neglect of the owner of the building if the Insured is not the owner thereof, or by any act or neglect of any occupant of the building (other than the named Insured), when such act or neglect of the owner or occupant is not within the control of the named Insured; (2) By failure of the named Insured to comply with any warranty or condition contained in any form, rider or endorsement attached to this policy with regard to any portion of the premises over which the named Insured has no control; nor ‡(3) shall any insurance hereunder on building(s) be prejudiced by any error in stating the name, number, street or location of such building(s).

---

‡Note:—When insurance under this form is "Blanket," section (3) immediately above shall be changed to read as follows: nor (3) shall this insurance be prejudiced by any error in stating the name, number, street or location of any building(s) and contents covered hereunder.

Plaintiffs' Exhibit No. 4—(Continued)

18. Electrical Apparatus Clause: If electrical appliances or devices (including wiring) are covered under this policy, this Company shall not be liable for any electrical injury or disturbance to the said electrical appliances or devices (including wiring) caused by electrical currents artificially generated unless fire ensues, and if fire does ensue this Company shall be liable only for its proportion of loss caused by such ensuing fire.

Standard Forms Bureau Form 199-L (Jan. 1948)

Endorsement

Attached to and forming part of Policy No. 1070 of the (name of insurance company) The Home Insurance Company.

Agency at (city or town and state): Missoula, Montana. Dated November 3, 1950.

Issued to (give insured's name and mailing address): Darby Mills, Inc.

Property Insured: Various. (State whether building, machinery, or stock, and whether coverage is specific or blanket. If specific ..... give amount(s) and rate(s) applying to each item. Be sure to indicate percentage of average clause (if any).)

S.F.B. Form No.: .....

Is E.C.E. att'd? (yes or no): .....

Average Clause .....%

Location of Property: Conner, Montana.

City or Town, Conner. County, Ravalli. State, Montana.

Plaintiffs' Exhibit No. 4—(Continued)

Map Sheet..... Block..... Street No.....

Special Rate Page..... Line.....

Full Term Premium $.....

If risk is not specifically rated or not shown on Sanborn Map, give construction and occupancy of building and indicate all exposures and deficiencies:

.....

Commencement of Policy: Jan. 28, 1950.

Expiration of Policy: Jan. 28, 1951.

Effective Date of This Endorsement: Nov. 3, 1950.

Amount Insured: $5,000.00.

Old Rate: Fire, 6.287; E.C.E.....

New Rate: 6.287.

Additional Premium: Fire.....; E.C.E.....

Return Premium: .....

It is understood and agreed that the limits of liability under this policy is amended to read as follows:

Being for $5,000.00, its pro rata proportion, namely 5,000/26,300ths of each of the amounts specified and inserted in the blanks immediately proceeding the items on form attached, except Item No. 12, which is hereby deleted from coverage due to fire of March 20, 1950, which was total loss.

All other terms and conditions of this policy remain unchanged.

URTON COMPANY.

By /s/ HARRY URTON,
Agent (Agent's signature).

199-L—Jan. 1948.

Plaintiffs' Exhibit No. 4—(Continued)
Standard Forms Bureau Form 199-S (Jan. 1948)
Endorsement

Attached to and forming part of Policy No. 1070 of the (name of insurance company): Home Insurance Company.

Agency at (city or town and state): Missoula, Montana. Dated April 1, 1950.

Issued to (give insured's name and mailing address): Darby Mills, Inc.

Property Insured: Sawmill and Planer, all property form. (State whether building, machinery, or stock, and whether coverage is specific or blanket. If specific ..... give amount(s) and rate(s) applying to each item. Be sure to indicate percentage of average clause (if any).)

S.F.B. Form No.: .....

Is E.C.E. att'd? (yes or no): .....

Average Clause .....%

Location of Property: Conner, Montana, and Darby, Montana.

City or Town, Conner & Darby. County,..... State, Montana.

Map Sheet..... Block..... Street No.....

Special Rate Page..... Line.....

Full Term Premium $.....

If risk is not specifically rated or not shown on Sanborn Map, give construction and occupancy of building and indicate all exposures and deficiencies:

.....

Plaintiffs' Exhibit No. 4—(Continued)

Commencement of Policy: 1/28/50.

Expiration of Policy: 1/28/51.

Effective Date of This Endorsement: 1/28/50.

Amount Insured: $5,000.00.

Old Rate: Fire, 9.094; E.C.E.....

New Rate: 6.287.

Additional Premium: Fire.....; E.C.E.....

Return Premium: $140.35.

In consideration of a Return Premium of $140.35, it is hereby understood and agreed that the Planer at Darby, Montana, is eliminated from the coverage under this policy, and said policy amended to cover as per Form 78B attached, effective January 28, 1950.

All other terms and conditions of this policy remain unchanged.

URTON CO.

By /s/ J. G. JENKIN,

Agent (Agent's signature).

199-S—Jan. 1948.

Plaintiffs' Exhibit No. 4—(Continued)
Standard Forms Bureau Form 199-S (Jan. 1948)
Endorsement

Attached to and forming part of Policy No. 1070 of the (name of insurance company): Home Insurance Company.

Agency at (city or town and state): Missoula, Montana. Dated January 28, 1950.

Issued to (give insured's name and mailing address): Darby Mills, Inc.

Property Insured: Various. (State whether building, machinery, or stock, and whether coverage is specific or blanket. If specific.....give amount(s) and rate(s) applying to each item. Be sure to indicate percentage of average clause (if any).)

S.F.B. Form No.: .....

Is E.C.E. att'd? (yes or no): .....

Average Clause .....%

Location of Property: Conner, Montana.

City or Town, Conner. County..... State, Montana.

Map Sheet..... Block..... Street No.....

Special Rate Page..... Line.....

Full Term Premium $.....

If risk is not specifically rated or not shown on Sanborn Map, give construction and occupancy of building and indicate all exposures and deficiencies:

.....

Plaintiffs' Exhibit No. 4—(Continued)

Commencement of Policy: 1/28/50.

Expiration of Policy: 1/28/51.

Effective Date of This Endorsement: 3/25/50.

Amount Insured: $5,000.00.

Old Rate: Fire.....; E.C.E.....

New Rate: .....

Additional Premium: Fire, $21.47; E.C.E.....

Return Premium: .....

It is hereby understood and agreed that the Effective Date of the new rates applying to this property should be March 25, 1950, in lieu of 1/28/50 as originally endorsed.

The return premium is $118.88 in lieu of $140.35, making an Additional Premium charge of $21.47.

All other terms and conditions of this policy remain unchanged.

URTON CO.

By /s/ J. G. JENKIN,

Agent (Agent's signature).

199-S—Jan. 1948.

Standard Forms Bureau Form 78-B (April 1948)
Not for California

Attached to and forming part of Policy No. 1070 of the (Name of insurance company) Home Insurance Company.

Issued to (Name of insured) Darby Mills, Inc.

The property covered hereunder is used princi-

Plaintiffs' Exhibit No. 4—(Continued)

pally as (Describe principal occupancy) Saw Mill, Equipment & Stock & Buildings.

Agency at (City or town and state) Missoula, Montana.

Dated January 28, 1950.

This policy covers the following described property, all situated Conner, Montana.

See Insuring clause below

This policy being for $5,000.00 covers its pro rata proportion, namely 5.000.00/27,500ths of each of the amounts specified and inserted in the blanks immediately proceeding the following items.

Item No.	Description or Location	Building	Furniture-Fixtures-Machinery-Equipment	Stock
	Conner, Montana (West Fork)			
1.	Sawmill	$ 2,000.00	$12,500.00	
2.	Blacksmith Shop (Frame)	125.00	150.00	
3.	Machine Shop (Frame)	1,500.00	1,000.00	$700.00
4.	Oil House (Frame)	100.00		125.00
5.	Bunkhouse (Frame-Brick Ch.)	1,000.00		
6.	Bunkhouse (Same as No. 5)	300.00		
7.	Bunkhouse (Same as No. 5)	300.00		
8.	Cook House (Frame-S. P. Ch.)	2,000.00	400.00	
9.	Shed and Garage (Frame)	500.00		
10.	Dwelling (Frame-Brick Ch.)	2,400.00		
11.	Dwelling (Frame-S. P. Ch.)	1,200.00		
12.	Dwelling (Frame-Brick Ch.)	1,200.00		

Plaintiffs' Exhibit No. 4—(Continued)

[Paragraph Nos. 1 to 18, inclusive, identical to paragraphs 1 to 18 set out on pages 49 to 61 of this printed record.]

* * *

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

URTON CO.

By /s/ J. G. JENKIN,

Agent (Agent's Signature).

78-B April 1948.

This form may be used for "Blanket" insurance or for "Specific" insurance.

Plaintiffs' Exhibit No. 4 admitted in evidence March 24, 1952.

[Stipulation Endorsed]: Filed Aug. 13, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Come now the defendants, and each and all of them, in the above-entitled cause, and move the Court to set aside the verdict rendered by the jury in this action on the 26th day of March, 1952, and the judgment entered thereon on the 2nd day of

April, 1952, and to enter judgment in accordance with the Motion for a directed verdict made by the defendants, and each of them, at the close of all the evidence in the case.

This motion is made, and will be argued, upon all of the grounds urged by the defendants in support of their motions for a directed verdict, to wit:

1. That the insurance policies introduced in evidence by their terms provide that there may be no assignment of them without the written consent of the company, and likewise provide that no agent has any power to waive any provisions of said policies unless such waiver be given in writing.

2. That the evidence in this case specifically showed that the agent in question had no power to make any assignment of any interest in the fire insurance policies without the express consent of the defendants herein, and on the ground that there never was any express consent given by such defendants.

3. That the evidence fails to show that there ever was as between the plaintiff Darby Mills and the plaintiff Alex Shulman any transfer of any interest in the policies introduced in evidence.

Dated this 4th day of April, 1952.

SMITH, BOONE & RIMEL,

By /s/ RUSSELL P. SMITH,

Attorneys for the Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed April 4, 1952.

[Title of District Court and Cause.]

ORDER

The defendants' motion for judgment notwithstanding the verdict having been presented to the Court on the 10th day of April, 1952, and briefs having been submitted by each of the parties, and the Court having considered the briefs submitted, and being fully advised in the premises,

It Is Therefore Ordered that the defendants' motion for judgment notwithstanding the verdict be and the same hereby is denied on the grounds and for the reasons as set forth in the Court's memorandum filed herewith.

It Is Further Ordered that the Clerk of this court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 16th day of July, 1952.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed July 16, 1952.

Entered and docketed July 17, 1952.

[Title of District Court and Cause.]

MEMORANDUM

This is an action by Darby Mills, Inc. and Alex Shulman to recover for the loss by fire of personal property covered by fire insurance policies issued by the seven defendant companies.

The policies of insurance were issued in the name of Darby Mills, Inc. and covered both real and personal property, which property was, at the time of the issuance of insurance, owned by Darby Mills. The property consisted of saw mill machinery and equipment and the buildings in which the machinery and equipment were located.

On December 15, 1950, by a written bill of sale and purchase agreement, Darby Mills conveyed all of the machinery and equipment to Alex Shulman, retaining the real property. In this transaction Darby Mills was represented by Mr. Ward Rukgaber. Upon the execution of the bill of sale and purchase agreement, a discussion was had between Mr. Rukgaber and Mr. Shulman relative to the fire insurance coverage, and it was agreed between them that Mr. Rukgaber would contact Urton & Co., the agent of defendants, to determine whether it could be arranged to have the existing insurance cover Alex Shulman as well as Darby Mills during the time Shulman was dismantling and removing the equipment. The evidence shows and the jury found that pursuant to the agreement between Rukgaber and Shulman that Rukgaber did contact Urton & Co. and obtain from that Company the

consent to the transfer of the insurance and a promise to prepare and forward to Darby Mills the necessary endorsements to effect the change. This agreement by Urton & Co. was made known to Mr. Shulman. However, the endorsements were never prepared.

Thereafter, on January 2, 1952, a fire occurred which destroyed the insured property. Claims were made by Darby Mills and Alex Shulman. The defendant companies paid the loss on the real property to Darby Mills without question, but declined the claim of Shulman for the loss of the personal property on the ground that there had been no consent in writing of the defendant companies to the transfer of the insurance, and this suit resulted. Defendants in their answer pleaded the lack of the consent in writing to the transfer of the insurance, and also that plaintiffs failed to furnish proofs of loss within the time required by the policies.

During the course of the trial motion for nonsuit against plaintiff Darby Mills was granted because it appeared from the evidence that Darby Mills had no insurable interest in the personal property at the time of the fire, and the case was finally submitted to the jury upon the following special verdict:

> "1. Did Darby Mills, acting through J. Ward Rukgaber, request James Jenkins, as agent of the defendant companies, to agree to a transfer of the insurance covering the saw

mill machinery and equipment to Alex Shulman?

"2. If your answer to the above question is Yes, then answer the following question: Did James Jenkins agree to the transfer of the insurance to Alex Shulman?

"3. If your answer to each of the above questions is Yes, then answer the following question: What was the actual cash value of the machinery and equipment destroyed in the fire?"

The jury answered the first two questions in the affirmative and fixed the amount of the damage, and defendants filed a motion for Judgment, notwithstanding the verdict, on the grounds:

I.

"That the insurance policies introduced in evidence by their terms provide that there may be no assignment of them without the written consent of the company, and likewise provide that no agent has any power to waive any provisions of said policies unless such waiver be given in writing.

II.

"That the evidence in this case specifically showed that the agent in question had no power to make any assignment of any interest in the fire insurance policies without the express consent of the defendants herein, and on the ground that there never was any express consent given by such defendants.

III.

"That the evidence fails to show that there ever was as between the plaintiff Darby Mills and the plaintiff Alex Shulman any transfer of any interest in the policies introduced in evidence."

The determination of defendants' motion upon the first two grounds specified will be determinative of the motion upon the third ground, because had there been no policy provision requiring the consent of the companies to the assignment of the insurance, there would be no question that the conversation between Rukgaber, acting on behalf of Darby Mills, and Shulman, and their agreement with respect to the insurance which resulted in Rukgaber's requesting the consent of Urton & Co. to the transfer, would have constituted an oral assignment. The intent of Rukgaber to make the assignment was clear from the evidence, and that is the determining factor as to whether or not there was an assignment, aside from the policy provisions requiring consent of the insurers. 29 Am. Jur., Sec. 503; 45 C.J.S., Sec. 422. The non-delivery of the policies to Shulman upon the assignment to him is not significant, because both real and personal property was covered by the same policies, and Darby Mills, having retained the real property, was entitled to retain the policies covering that property, even though they had assigned the insurance insofar as it covered the personal property.

It likewise follows that if, as a matter of law, the consent to the transfer of the insurance, which

the jury found was given by Mr. Jenkins of Urton & Co., is binding on the defendant companies, the policy provision requiring consent of the companies to any assignment of insurance was complied with, and the oral assignment to Shulman was sufficient.

Therefore, the question which will be decisive of defendants' motion for judgment notwithstanding the verdict is whether, as a matter of law, the consent to the transfer of insurance, insofar as it covered personal property, which the jury found was given by Mr. Jenkin, was binding on defendant companies in the face of the following policy provisions:

> "Assignment of this policy shall not be valid except with the written consent of the company.
>
> "No permission affecting this insurance shall exist or waiver of any provision be valid, unless granted herein or expressed in writing added thereto."

It is to be noted that there is no question that Jenkin at all times acted within his authority as a member of the firm of Urton & Co., that his acts were those of Urton & Co., and that anything Urton & Co. had authority to do with reference to these policies could be done by Jenkin.

The above policy provision with reference to waivers and permissions affecting the insurance, which is the same in all of the policies involved, is not of the type found in some policies restricting the right of agents to make waivers, but merely re-

quires that a waiver or permission affecting the insurance, by whomever made, must be in writing.

At first glance there appears to be a conflict in authority as to whether such provisions in insurance policies may be waived by parol. See 2 Couch Cyc. of Insurance Law, Sec. 522(f); 16 Appleman Insurance Law and Practice, Sec. 9214.

It seems settled, however, even by authorities recognizing parol waivers where the policy requires waivers to be in writing, that the person making the oral waiver must have authority to make written waivers, such as a general agent. 16 Appleman Insurance Law and Practice, Sec. 9213; Alexander vs. Gen. Ins. Co. of America, 22 Fed. Supp. 157. Thus, in order to determine whether the oral consent to the transfer of insurance given by Urton & Co. is binding upon defendant companies, it is necessary to determine the status of Urton & Co.'s agency for defendants.

In their brief defendants take issue with the Court for having referred to Urton & Co. throughout the trial as general agents. Paragraph IV of defendants' answer recites:

> "Admit that the firm of Urton & Company at Missoula, Montana, was an agent for the insurance companies named in the complaint, and had power to receive applications and take risks for insurance, and to make out and endorse policies of insurance on property against loss by fire. Admit that said Urton & Company had power to collect and receive premiums. Admit that Urton & Company, as the agents

of the defendants, did issue the policies described in Paragraphs X to XVI of the complaint. Deny each and every allegation, matter and thing contained in Paragraph XVII of the complaint not herein specifically admitted, and specifically deny that Urton & Co. had power to make oral assignments of an interest in insurance policies."

The admitted powers of Urton & Co. underlined above clearly establish Urton & Co. as a general agent under the definition of that term contained in 16 Appleman Ins. Law and Practice, Sec. 8691 and 2 Couch Cyc. of Ins. Law, Sec. 506 and 29 Am. Jur. Sec. 96. The specific denial contained at the end of the above quoted paragraph IV of the answer is merely a conclusion of law upon the very point the Court is now called upon to rule.

The evidence also establishes Urton & Company as general agents for the companies involved. The following appears in the testimony of Mr. Jenkin on cross-examination:

"Q. And the Urton Company is a general agent for the insurance companies, these insurance companies that are defendants in this action?

"A. They are."

The only limitation upon the authority of Urton & Co. with respect to saw mill risks shown by the evidence was a limitation with respect to the question of the risk itself. Once having obtained authority to take a saw mill risk on behalf of the com-

panies, it appears from the evidence that all the powers of a general agent resided in Urton & Co. They wrote the policies; they endorsed the policies and some of such endorsements were made as a result of correspondence between Darby Mills and Urton & Co., and all of the endorsements were prepared and forwarded to Darby Mills without Urton & Co. ever having possession of the policy at the time of the endorsements; they accepted the premiums; they changed the premiums by endorsement; they did everything that the company itself could do. The reason for the limitation upon their authority with respect to saw mill risks had only to do with the fact that saw mills are a more hazardous risk; it had nothing to do with the person insured. Once having ascertained that the companies were willing to go on a saw mill risk, Urton & Co. had the authority to decide on the risk with respect to the party to be insured, to write and endorse the policy, to collect premiums and so forth.

But aside from the question of whether the term "general agent" is appropriately applied to Urton & Co., the important question here is whether Urton & Co. had authority to make waivers with respect to the insurance. 2 Couch Cyc. of Ins. Law, Sec. 506. As noted previously, there is no denial of that authority to them by the terms of the policies, they did write the policies, they did endorse the policies, it is admitted in the answer that they did have authority to write and endorse policies of insurance. As a matter of fact, one of the insurance

policies which was introduced in evidence (Plaintiff's Ex. 5) issued by Atlas Assurance Co., Ltd. contains on the last page thereof a form of consent to the assignment of the policy for execution by an agent, all of which leads to the conclusion that Urton & Co., whether general agents or not, did have authority to make waivers with respect to this isurance in writing as provided by the policies. Finally, Mr. Jenkin further testified on cross-examination:

> "Q. You have authority then Mr. Jenkin to not only accept applications for original insurance but also to make endorsements to meet changing conditions under the policy?
>
> "A. Yes.
>
> "Q. Isn't it a fact that you make endorsements for purposes of indicating a change of interest in the property such as a sale under contract?
>
> "A. We do."

The question remains, however, whether Urton & Co., having authority to make waivers in writing, also had authority to make a binding parol waiver. As noted before, there appears to be conflict of authority on this point. The Montana Supreme Court, so far as this Court can find, has never ruled upon that question. The case of Tuttle vs. Pacific Mut. Life Ins. Co., 190 Pac. 993, cited by defendants does not cover this point. In that case there was a provision in the policy against a waiver by an agent and it was upon that basis that the

Court decided the waiver question presented there, and the Court specifically declined to consider the question with which we are confronted in this case. The Court said:

> "Where the policy contains provision against waiver by an agent, it is both notice to and agreement by the policy holder that no agent of the company has authority to waive the condition (Citing cases).
>
> "Three letters, admittedly coming from the home office, were introduced and the material parts of their contents have been heretofore quoted. No one of these letters is signed as provided for in the policy; but we shall not pass upon the question as to whether such requirement is reasonable or not, as, in our opinion, nothing contained in the letters could constitute a waiver, even though signed."

Defendants also cite two Montana Code Sections to the effect that transfer of a thing insured does not itself transfer the insurance (Sec. 40-409, R.C.M. 1947) and that transfer of interest in a thing insured, unaccompanied by a corresponding transfer of insurance, suspends the insurance (Sec. 40-213, R.C.M. 1947). The first section referred to has no application because as noted before, there is no question that, aside from the policy provision requiring consent of the companies to assignments of insurance, as between Darby Mills and Alex Shulman the insurance was transferred. The same observation may be made with regard to the other quoted section.

The next case cited by defendants, St. Paul Fire & Marine Ins. Co. vs. Ruddy, 299 Fed. 189, is likewise not in point. In that case the Court also specifically declined to rule upon the question under consideration here, saying at page 194:

> "The policy provides that no authorized agent could waive the provisions thereof unless the waiver was endorsed on the policy; but a provision against waiver might be waived by those who had authority so to do. That question however is not material here."

The cases of Ray vs. Canton Cooperative Fire Insurance Co., 36 N.E.(2d) 639 N. Y., and Morgan vs. American Cent. Ins. Co., 92 S.E. 84 (W.V.) also cited by defendants seem to swing upon the fact that the policies involved never were in the possession of the defendants, or their agents, and it was therefore impossible to endorse a waiver upon them. While the policies in the instant case also were not in the possession of Urton & Co., there was no such necessity here because the evidence is clear that numerous endorsements were made to all of the policies by Urton & Co. without their ever having possession of the policies. It was a well established practice of Urton & Co., with reference to these various policies, to make endorsements and forward them by mail to Darby Mills to be attached to the policies. The language of the Court in Morgan vs. American Cent. Inc. Co., supra, indicates that under such circumstances the Court would have recognized the validity of the waiver. The Court said:

> "If Hatfield had left his policy with the agent and he had agreed to endorse on it the written consent of his company to the transfer of it, the case would then have presented a question very similar to the Craft case (wherein a waiver was recognized), because he would then have agreed to do a thing which he had the power to do, and which he should have done instantly."

The evidence here shows Urton & Co. had the power to make endorsements without possession of the policies, and in fact exercised that power on numerous prior occasions, and it should have done it instantly.

Defendants next case, Aliff vs. Atlas Assurance Co., 135 S.E. 903 (W.V.) was decided on the question of the sufficiency of the plaintiff's statement or complaint in setting up the agreement relied upon as a waiver, but there the Court also recognized that a waiver may be made by parol. The Court said:

> "We think this evidence was sufficient to establish an express agreement before loss to make the requisite endorsement on the policy to protect plaintiff's right. But was defendant given sufficient notice * * * in plaintiff's statement. We think not. The statement was only that the agent after receiving the policy retained it for an unreasonable time. * * * This was not sufficient. He must have agreed to bind the assurance company, and that an agent

may so bind the Company is well settled by authority, as well in law as in equity cases. (Citing cases)."

As to the cases of Bruce, et al. vs. American Cent. Ins. Co., 120 S.E. 13, and Bruce, et al. vs. Savannah Fire Ins. Co., 120 S.E. 19, both Georgia cases, the full facts of the cases did not appear in the report of the cases, as only the syllabi of the Court is reported in the Southeastern Reporter.

The case of Lett vs. Guardian Fire Ins. Co., 125 N. Y. 82, 25 N.E. 1088, holds that conveyance of insured property and an assignment of the policy conveys no interest in the insurance to the assignee by itself, and until the consent of the insurer was obtained the policy was a dead instrument in the hands of the assignee. However, the very question involved in this case is the validity of that consent which would breathe new life into the policies.

It thus appears that many of the authorities, seemingly holding that a parol waiver of a provision in an insurance policy which provides waivers must be in writing is not effective, are limited to the facts of the particular case; and some of the Courts so holding, specifically recognize that under other circumstances they would give effect to an oral waiver. Morgan vs. American Cent. Ins. Co., supra, Atliff vs. Atlas Assurance Co., supra, St. Paul Fire & Marine Ins. Co. vs. Ruddy, supra.

On the other hand, there are numerous authorities holding such oral waivers to be effective despite policy provisions requiring waivers to be in writing.

"An insurance agent, authorized to waive provisions of a policy, may do so orally, though the policy provides that a waiver must be endorsed thereon."

16 Appleman Ins. Law and Practice, Sec. 9213:

"So, also, under our decisions no question exists as to the power and authority of a general agent to modify the insurance contract or waive a condition of a written fire insurance policy by parol. And this is true even though the policy contains a written stipulation to the contrary. (Citing cases)."

Lattner vs. Federal Union Ins. Co., 163 Pac. (2d) 389 (Kan.)

"It is well established that an insurance company may waive any contractual condition or restriction in a policy, even the condition that such a waiver must be in writing. Whether or not the director-agent in the instant case had specific or apparent authority to waive a condition is a question of fact. Such a waiver may be established by a course of conduct or by the word or deed of an agent acting within the scope of his real or apparent authority."

Biloz vs. Tioga County Partons' Fire Relief Assn., 21 N.Y.S. 2d 643.

See also: 2 Couch Cyc. of Ins. Law, Sec. 522(f); 29 Am. Jur. "Insurance," Secs. 803, 804, 820; Maryland Casualty Co. vs. McTyier, 150 Tenn. 691, 266 S. W. 767,

48 A.L.R. 1168; American Fire & Casualty Co. vs. Eastham, 185 Fed. (2d) 729 (Tex.); Anno. 38 A.L.R. 636; Bank of Anderson vs. Home Ins. Co., 111 Pac. 507 (Cal.); Collard vs. Universal Automobile Ins. Co., 45 Pac. (2d) 288 (Ida.); Saucier vs. Life & Casualty Ins. Co. of Tenn., 179 So. 851 (Miss.); Standard Accident Ins. Co. vs. Southwestern Trading Co., et al. 154 Fed. (2d) 259 (Tex.—CCA5); Home Insurance Company of N.Y. vs. Roberts, 100 S.W. 2d 91 (Tex.); 14 R.C.L. 1163.

The foregoing citations seem to represent the weight of authority, and in addition, they appeal to the Court as representing the sounder view. In this case, the policies involved are standard form policies. The evidence discloses that Urton & Co. wrote a considerable volume of fire insurance, and presumably much, if not all of such fire insurance was written on standard form policies containing the same provision with reference to written waivers as the policies involved here. Yet the evidence shows that the fire insurance business of Urton & Co. was not conducted in nearly as formal or technical a manner as the standard form of policy would seem to require. The evidence showed Urton & Co. customarily arranged for fire insurance coverage for their patrons by telephone, with coverage effective from the instant of the call, and in advance of the preparation of the written policy or the payment of the premium, and various changes in insurance coverage were customarily made in the same manner.

In addition, it is difficult to see where defendants were prejudiced in any way by the change in ownership. There was some evidence that a saw mill is a more than usual hazardous fire insurance risk. The evidence indicates, however, that such extra-hazard exists only with reference to operating saw mills, and the mill in question was not an operating saw mill, but was in the process of being dismantled. But, irrespective of whether this particular saw mill under the circumstances could be considered an extra-hazardous risk, the defendants had willingly assumed the risk—and presumably the premiums charged reflected any unusual risk—and it is difficult to see that this saw mill in the hands of Alex Shulman was any greater risk than the same saw mill in the hands of Darby Mills.

Finally, the evidence is undisputed that at no time prior to the fire, or after the fire up to the time of trial, did the defendants offer or make an effort to refund what would have been unearned premiums if the insurance policies became dead instruments at the time of the transfer, as defendants now maintain, and this despite the fact they knew of the transfer.

The Court holds, as a matter of law, that the oral consent by Mr. Jenkin to the transfer of the insurance, as found by the jury, is binding on the defendant companies.

In addition to the foregoing, it appears to the Court in this case that the defendant companies are estopped to deny the validity of the consent to the transfer of the insurance by Mr. Jenkin. The

evidence shows that Rukgaber, acting for Darby Mills, and Shulman, at the time the bill of sale to the property was executed, discussed the question of insurance; that they agreed as between themselves that Mr. Rukgaber would call on Urton & Co. to see about transferring the insurance, or modifying it so as to cover Shulman; that pursuant to said agreement, Rukgaber called on the Urton company and obtained from that company the oral consent to the transfer of the insurance, and an agreement to prepare endorsements effecting the change and forward them by mail; that such agreement by Urton & Co. was communicated to Mr. Shulman by Mr. Rukgaber, and relying on that agreement, Mr. Shulman took no further steps to protect himself by obtaining other insurance. Upon the principles and authority set forth in 45 C.J.S., Sec. 702, and cases therein cited, the Court finds that the defendants are estopped to set up the lack of the written endorsement to deny liability on their policies. See also 29 Am. Jur. "Insurance," Secs. 804, 832, et seq.; 16 Appleman Ins. Law and Practice, Secs. 9121, et seq., and cases cited.

For the above reasons, the motion of defendants for judgment notwithstanding the verdict is denied.

Dated this 16th day of July, 1952.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed July 16, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendants, Atlas Assurance Company, Ltd., a Corporation, Aetna Insurance Company, a Corporation, The Home Insurance Company, a Corporation, Providence Washington Insurance Company, a Corporation, National Union Fire Insurance Company, a Corporation, and Niagara Fire Insurance Company, a Corporation, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 3rd day of April, 1952.

Dated this 12th day of August, 1952.

SMITH, BOONE & RIMEL,

RUSSELL E. SMITH,

W. T. BOONE,

By /s/ JACK W. RIMEL,

Attorneys for all of the above-named Defendants.

[Endorsed]: Filed August 13, 1952.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which Appellants will rely on appeal are:

1. The Court erred in refusing to direct a verdict in favor of the defendants, and against the plaintiff, Alex Shulman, doing business as Alex Shulman Company, at the close of the plaintiffs' case.

2. The Court erred in refusing to direct a verdict in favor of the defendants, and against the plaintiff, Alex Shulman, doing business as Alex Shulman Co., at the close of all of the evidence.

3. The Court erred in refusing to direct a judgment for the defendants notwithstanding the verdict.

In connection with these points the defendants intend to rely upon the proposition that as a matter of law no valid judgment could be entered against the defendants because the insurance policies specifically provide that there could be no assignment of them without the written consent of the defendant companies, and that there was no such consent; that the policies specifically provide that no agent has the power to waive any provisions of the policies unless the waiver be given in writing, and that there was no such written waiver; that the evidence shows that the agent in this case had no power to make any assignment of any interest in

the fire policies in question without the express consent of the defendants, and that no such express consent was given; that the evidence fails to show that any interest in the insurance policies in question was assigned to the plaintiff, Alex Shulman by the plaintiff, Darby Mills.

Dated this 17th day of August, 1952.

/s/ RUSSELL E. SMITH,

/s/ W. T. BOONE,

/s JACK W. RIMEL,

Attorneys for Defendant-Appellants.

Service of copy acknowledged.

[Endorsed]: Filed August 13, 1952.

In the United States District Court, District of Montana, Missoula Division

No. 566

DARBY MILLS, INC., a Corporation, and ALEX SHULMAN, Doing Business as ALEX SHULMAN CO.,

Plaintiffs,

vs.

ATLAS ASSURANCE COMPANY, Ltd., a Corporation; AETNA INSURANCE COMPANY, a Corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation; THE HOME INSURANCE COMPANY, a Corporation; PROVIDENCE WASHINGTON INSURANCE COMPANY, a Corporation; NATIONAL UNION FIRE INSURANCE COMPANY, a Corporation; and NIAGARA FIRE INSURANCE COMPANY, a Corporation,

Defendants.

PARTIAL TRANSCRIPT OF TESTIMONY

Be It Remembered, that the above cause came on on regularly for trial on the 24th day of March, 1952, at Missoula, Montana, before the Hon. W. D. Murray, United States District Judge for the District of Montana, sitting with a jury. The plaintiffs were represented by their counsel, Mr. J. C. Garlington, of Missoula, Montana, and Mr. D. J. Korn, of Kalispell, Montana; and the defendants

were represented by their counsel, Mr. Russell E. Smith and Mr. W. T. Boone, of Missoula, Montana.

Thereupon, the cause was tried, and the following is a partial transcript of the evidence presented at said trial:

WARD RUKGABER

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Garlington:

Q. Will you state your name, please?

Mr. Smith: At this time, may it please the Court, the defendants object to the introduction of any evidence on the ground the complaint of the plaintiffs herein fails to state a cause of action upon which relief may be granted.

The Court: Objection overruled.

A. Ward Rukgaber.

Q. Where do you live, Mr. Rukgaber?

A. Darby.

Q. How long have you lived at Darby?

A. Four years and a half.

Q. What is your business or occupation?

A. I am working in the office of Eden's Lumber Company.

Q. That company has no connection with this case one way or the other?

A. None whatever. [2*]

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Ward Rukgaber.)

Q. It is not connected in any respect with Darby Mills? A. No.

Q. Were you formerly employed in any capacity by the plaintiff, Darby Mills, Incorporated?

A. Yes.

Q. When was that, Mr. Rukgaber?

A. From September, 1947, until August of 1951.

Q. In what capacity were you employed, what were your duties in a general way?

A. Treasurer and general manager.

Q. What type of business operation was being conducted during that period of time?

A. Sawmilling, planing, and surfacing lumber for shipment, a complete process.

Q. Were you the man who was on the ground and substantially in charge of that business then?

A. Yes.

Q. Who was the president of the Darby Mills?

A. Mr. H. R. Rukgaber.

Q. Is he a relative of yours?

A. He is a cousin.

Q. Where did he live? A. Toledo, Ohio.

Q. Was he the principal stockholder in the company? A. Yes. [3]

Q. Now, the subject matter of this case involves a sawmill being operated by the Darby Mills. Will you tell the jury where the sawmill was located?

A. The sawmill was on the West Fork of the Bitterroot River, about 13 miles from Darby, or five miles from Conner.

Q. Will you just describe it in a general way,

(Testimony of Ward Rukgaber.)

as to the type mill, its capacity, and what kind of equipment it had?

A. It was a steam operated mill, capacity, 30,000 feet per day, board feet.

Q. Was it operated by the Darby Mills, Incorporated?

A. Yes, we operated it up until the illness of the president.

Q. Did Darby Mills also operate a planer mill in a separate location? A. Yes.

Q. When was the sawmill operation discontinued? A. In the winter of 1949.

Q. And then do I understand that it lay idle from then until the winter of 1950?

A. That's right.

Q. Now, at the time that it was shut down in the winter of 1949, will you tell us whether it was in an operational and functioning condition?

A. It was.

Q. Did anything transpire prior to the fire to change that [4] condition, well, up until December 15, 1950? A. No.

Q. It remained in an operational and functional condition? A. Yes.

Q. Now, was a negotiation entered into to dispose of the sawmill by Darby Mills? A. Yes.

Q. And did that negotiation involve Mr. Alex Shulman here? A. Yes.

Q. When did that commence?

A. The last of November of 1950.

Q. Of 1950? A. Yes.

(Testimony of Ward Rukgaber.)

Q. And was an agreement negotiated for the sale of the sawmill machinery and equipment to Mr. Shulman? A. Yes.

Mr. Garlington: Your Honor, this Exhibit 1 is, was attached as an exhibit to the answer, but for the purposes of trial and ready reference here, it may be more convenient to have a separate document.

The Court: Very well.

Q. I hand you here a document marked Plaintiffs' Exhibit 1. I will ask you to examine it and state what it is?

A. This is a purchase agreement and bill of sale.

Q. Between whom? [5]

A. Between Alex Shulman Company and Darby Mills.

Q. This Exhibit 1 is the culmination of negotiations between Darby Mills and Shulman for the purchase of this sawmill machinery and equipment?

A. That's right.

Mr. Garlington: I wonder if it wouldn't be better to read this to the jury?

The Court: You better offer it, I think.

Mr. Smith: May I see it?

Mr. Garlington: We offer in evidence Plaintiffs' Exhibit 1.

The Court: Is there any objection?

Mr. Smith: No objection.

The Court: Very well, it may be admitted.

(Testimony of Ward Rukgaber.)

PLAINTIFFS' EXHIBIT No. 1

"Bill of Sale and Purchase Agreement

"This Indenture, entered into this 15th day of December, 1950, by and between Darby Mills, Inc., a Montana corporation having its principal Office at Darby, Montana, as party of the first part hereafter referred to as the Seller and Alex Shulman Co., a co-partnership consisting of Louis Schwartz, Harry Schwartz and Alex Shulman, doing business at Somers, Montana, as party of the second part hereafter referred to as the Buyer.

"Witnesseth, the Seller does hereby grant, bargain, sell and convey unto the Buyer and to its successors and assigns all saw mill machinery and equipment of whatsoever kind or nature now located at and used in connection with that certain saw mill belonging to the Seller at Conner, Montana, including in particular but without being limited or restricted to, each and all of the following items, to wit:

2 Skid Pans.

1 lot Log Chokers.

1 AC Tractor, Serial # HD-10W 3935, Motor # 47110222, equipped with 1 CU-1 single drum cable control unit, serial # 13091.

1 AC Tractor, serial # HD-10W 3942, motor # 47110219, equipped with 1 CU-1 single drum cable control unit and dozer blade.

1 1941 Dodge Pickup ½ ton truck bearing motor # 7156.

(Testimony of Ward Rukgaber.)

1 P & H Arc Welder, serial # 244803.

1 Blacksmith Forge.

1 lot Oil drums and grease in drums.

1 Log Haul Chain.

1 M & C Engine, belt & chain for log haul.

1 Steam drag cut-off saw.

1 American saw mill with 4 ft. block opening, new carriage.

1 set ball-bearing saw husks & drum.

1 Refuse elevator and chain.

1 Ball bearing slash cut-off saw, frame & fittings.

1 Wash. Iron boiler—150# pressure.

1 Wright horizontal boiler—125# pressure.

1 American power feed 4-saw edger with 2 sets saws.

1 Trimmer saw.

1 set roller casings.

1 Log nigger, check & engine.

1 set 100 h/p steam engine—11x14 cylinders.

340 feet Green chain, complete with shafting & gears.

1 Twin-engine dynamo & engine—125 volt.

1 B T & B saw grinder.

1 71/2 size Deane steam pump.

5 2 ft. Saws.

4 4 ft. Saws.

1 lot Pulleys, shafting, boxing, belting, etc., to run entire mill.

1 small steam turbine generator.

1 small steam engine—to run carriage.

6 Drag-saw blades.

"To have and to hold the same unto the Buyer,

(Testimony of Ward Rukgaber.)

its [7] successors and assigns forever; and the Seller does covenant and agree to and with the Buyer that the Seller is the lawful owner of all of the said property with full power and authority to sell the same, free and clear of all liens and encumbrances of whatsoever kind, nature and description.

"It is mutually understood and agreed that all of the aforementioned property shall be deemed to be delivered to the Buyer hereunder, concurrently with the execution hereof, and the Buyer shall have the right to dismantle said plant and remove all of the said equipment from said Saw Mill at Conner, Montana, within ninety days from and after the date hereof, unless prevented from so doing by causes beyond the control of the Buyer, in which event the Buyer will remove the same from said premises as soon thereafter as may be possible. All expenses incurred in dismantling said plant and removing said equipment shall be borne and fully discharged by the Buyer. In this connection, it is further understood and agreed that in order to remove the said equipment from said Saw Mill it may be necessary to remove certain wall sections and other portions of said Saw Mill building, and the Buyer shall not be required to replace the same but the Buyer shall, nevertheless, avoid causing any greater damage to said building than necessary in order to accomplish the removal of the said equipment.

"In full payment for all of said equipment the Buyer does hereby promise and agree to pay to the

(Testimony of Ward Rukgaber.)

Seller the total sum of $6,750.00 of which amount the sum of $3,375.00 has been paid to the Seller concurrently with the execution hereof, the receipt of which is hereby acknowledged by the Seller, and the balance thereof in the further sum of $3,375.00 shall be payable to the Seller upon completion of the removal of all of the said equipment from said saw mill premises and in any event, not later than January 15, 1951.

"In witness whereof, the parties hereto have caused this indenture to be executed for and on their behalf by their representatives thereunto duly authorized the day and year hereinabove first written.

DARBY MILLS, INC.

By /s/ J. WARD RUKGABER,
Plant Manager & [8]
Treasurer.

ALEX SHULMAN CO.

By ALEX SHULMAN,
Co-Partner."

Q. Now, Mr. Rukgaber, who did the negotiating for this agreement, Exhibit 1, on behalf of Darby Mills? A. The president of the corporation.

Q. How was it handled, just briefly?

A. By letter. A letter from Shulman Company came to us. We forwarded it on to him at Toledo for approval.

Q. He authorized the sale? A. Yes.

Q. Who participated in the preparation and signing of this Exhibit 1 contract?

(Testimony of Ward Rukgaber.)

A. I did.

Q. And Mr. Alex Shulman personally?

A. Yes.

Q. Where was that done?

A. In the office of Murphy, Garlington and Pauly.

Q. Here in Missoula?

A. Here in Missoula.

Q. Was the sawmill building itself sold and disposed of at this time? A. No.

Q. The sale referred entirely to the sawmill machinery and equipment? [9] A. Yes.

Q. Now, I call your attention to the list of items that are included in the Exhibit 1, and I just ask you generally whether you know if that list was a complete and detailed enumeration of all the things that were in the sawmill that were to be sold?

A. Not entirely, there are too many small items.

Q. This Exhibit 1 was intended to include at least the major items? A. Yes.

Q. Everything, however, large and small, was intended to be included in the sale? A. Yes.

Mr. Smith: We object to the introduction of any oral evidence intended to vary the terms of this writing, if that is the question.

The Court: What is the question, read the question?

(Question and answer read back by Reporter.)

Mr. Garlington: I would like to make a short statement.

(Testimony of Ward Rukgaber.)

The Court: Yes.

Mr. Garlington: In the first place, I think the question and answer do not depart from the terms of the document, because, beginning in the second line of the second paragraph, it says, "All sawmill machinery and equipment of whatsoever kind or nature, including but not limited to the [10] following." I wanted to make it clear to the jury what the extent of this list was.

The Court: Yes, the objection is denied.

Q. When was the Exhibit 1 signed, Mr. Rukgaber? A. December 15th, 1950.

Q. Where was it signed?

A. In Murphy, Garlington and Pauly's office in Missoula.

Q. Now, at that time and place, Mr. Rukgaber, was there any discussion between you and Mr. Shulman concerning the matter of insurance coverage on this property? A. Yes.

Mr. Smith: To which we object, your Honor, on the ground that the document appears to be a complete integration, and as such, it is the exclusive evidence of its terms. We object to the introduction of any evidence which has the effect of modifying or changing the terms of the agreement between the parties.

Court: The purpose is not to vary the terms of this agreement.

Mr. Garlington: That is the effect of the objection. I would like to be heard on this. It is our position that these people are strangers, and are

(Testimony of Ward Rukgaber.)

not in a position to raise the parol evidence rule.

Court: In any event, the purpose is not to vary the terms of this agreement. [11]

Mr. Garlington: We don't intend to contradict the agreement. The position we take is that there was a separate agreement concerning the subject of insurance coverage. I propose now to go into that subject.

Court: The objection is overruled.

Q. Will you state to the Court and jury, as best you can recall, what was said by you for Darby Mills and by Mr. Shulman concerning the matter of insurance protection and coverage on the sawmill machinery?

Mr. Smith: Just a minute. May it be understood our objection goes to this whole line of evidence?

Court: Yes, of course.

A. Mr. Shulman asked me if we carried insurance on the machinery. I told him we did. He said, "Could your insurance cover us while we are in the process of dismantling?" I told him I was not sure, but I would contact their agent and find out and advise him.

Q. Was anything discussed at that time concerning prorating and sharing the premium cost?

A. Mr. Shulman told me he would take care of any portion of the premium during the time he was removing the machinery.

Q. What statement, if any, did you make concerning the completion of those arrangements in connection with the insurance?

(Testimony of Ward Rukgaber.)

A. State that again? [12]

(Question read back by Reporter.)

Q. To Mr. Shulman?

A. I told him I would call on the agent and find out what could be done, if endorsements could be put in the policies to cover him.

Q. As between you and Mr. Shulman, who was to undertake that matter? A. I was.

Q. Now, in the capacity of treasurer and plant manager for Darby Mills, Incorporated, did you have anything to do, any responsibility concerning the insurance coverage and protection on the Darby Mills property? A. Yes.

Q. Did you keep yourself familiar with the insurance policies and insurance protection of the company's property? A. Yes.

Q. Was that true during the entire period of your employment by Darby Mills? A. Yes.

Q. Through what insurance agency was the insurance, the fire insurance on the Darby Mills property written?

A. The Urton agency here in Missoula.

Q. The Urton company here in Missoula?

A. In Missoula.

Q. Would that be true, then, during the years

(Testimony of Ward Rukgaber.)

1948, 1949 and [13] 1950? A. Yes.

Q. I hand you now an exhibit marked Plaintiff's Exhibit 2, and I will ask you to examine it, Mr. Rukgaber, and state generally, without stating its contents, what it is?

A. It is an insurance policy covering various equipment and buildings and properties at Conner.

Q. Whose properties? A. Darby Mills.

Q. By whom was it issued?

A. It was issued by the Urton company at Missoula.

Q. For what insurance company?

A. For the Aetna Insurance Company.

Q. And what are the dates of effectiveness of the policy in general, as stated on it?

A. January 28th, 1950 for one year to the 28th of January, 1951.

Q. Now, Mr. Rukgaber, I hand you the Plaintiff's Exhibit 3, and ask you to state whether, for the purposes of saving time, that is a similar policy issued by another insurance company?

A. Yes.

Mr. Smith: What policy is that?

Mr. Garlington: This is New Hampshire Fire Insurance Company. [14]

Q. And Exhibit 4 is a policy issued by the Home Insurance Company? A. Yes.

Q. And Exhibit 5 a similar policy issued by the Atlas Assurance Company? A. Yes.

Q. In addition to the poliices represented by the Exhibits 2 to 5, inclusive, were there also three

(Testimony of Ward Rukgaber.)

other policies in effect on the Darby Mills property? A. Yes.

Q. And those policies, I believe the pleadings show, have been surrendered to the insurance companies who issued them. A. Yes.

Mr. Garlington: May it also be agreed that the four policies represented by these exhibits, together with the three surrendered, represent the policies issued by the seven defendants in this case?

Mr. Smith: Yes, that may be agreed.

Q. Now, Mr. Rukgaber, will you tell us how you received the Exhibits 2, 3, 4, and 5, for Darby Mills, where did they come from?

A. From the Urton Company office in Missoula by mail.

Q. Addressed how?

A. To Darby Mills, Incorporated, Darby.

Q. Will you state generally whether the policies involved [15] here are renewals of previous policies issued through the same agency? A. Yes.

Mr. Garlington: Now plaintiff offers in evidence Exhibits 2, 3, 4, and 5.

Mr. Smith: No objection.

The Court: They are admitted.

(Plaintiffs' Exhibits 2, 3, 4, and 5, being respectively Policy No. 25-25827, issued to Darby Mills, Inc., by Aetna Insurance Co., Policy No. 1-66-19, issued to Darby Mills, Inc., by New Hampshire Fire Insurance Co., Policy No. 1070, issued to Darby Mills, Inc., by The Home Insurance Company, and Policy No. S 856533, issued to Darby Mills, Inc., by the Atlas Assur-

(Testimony of Ward Rukgaber.)

ance Company, Ltd., were here received in evidence, and will be certified to the Court of Appeals by the Clerk of the District Court, as original exhibits.)

PLAINTIFFS' EXHIBIT NO. 4
(Received in evidence March 24, 1952)

[Policy No. 1070, issued to Darby Mills, Inc., by the Home Insurance Company. See the stipulation re Plaintiffs' Exhibit No. 4 and Plaintiffs' Exhibit No. 4 on pages 38 to 68 of this printed record.]

Q. I hand you now Plaintiffs' Exhibit 2, and call your attention to certain endorsements which are affixed to the body of the policy. Do you know how those endorsements came to be affixed thereon?

A. Yes.

Q. Will you tell the jury how that was done? Speak up so they can all hear you.

A. Those endorsements were mailed to us with the instructions to attach them to the policies bearing the respective numbers.

Q. By whom were they mailed? [16]

A. By the Urton Company, Mr. Jenkin representing them, to the Darby Mills.

Q. Are you able to recall how these endorsements came to be called for? What arose that necessitated endorsements?

A. The first endorsement changed the policy from covering various equipment and machinery at the planing mill in Darby solely to the sawmill equipment, machinery and buildings at Conner. The second endorsement came about through an

(Testimony of Ward Rukgaber.)

excessive, what we assumed to be, rate, and we asked for a rate inspection, and we were billed with the premium for the ensuing year and asked to attach the endorsement to the policy. The next endorsement came through that they were unable to effect the rate change as of the date they desired, and moving it up to a later date, which effected an additional increase in the premium.

Q. How were these matters covered by the endorsements originated, what led to the sending of the endorsements to you by the Urton Company?

A. Through our correspondence to them requesting these changes, the rate change and the dropping of certain properties in Darby and removing everything to the sawmill building and equipment and various other buildings.

Q. Did you communicate with anyone else as agent or representative of defendant companies in connection with these matters? [17] A. No.

Q. Did you receive communications from anyone else representing these companies in connection with these matters? A. No.

Q. By referring to the Exhibit 2, can you state the total amount of insurance coverage which was being carried on the sawmill machinery and equipment which was in the fire?

Mr. Smith: We object to that, your Honor, on the grounds the policy is the best evidence of its own contents.

The Court: Yes, the objection is sustained.

Q. I ask you to refer to Standard Form 78B attached to the policy, and referring to the mimeographed sheet attached there, item 1, Sawmill build-

(Testimony of Ward Rukgaber.)

ing, $2,000; furniture, fixtures, machinery, equipment, $12,500. Will you state whether that item 1 which I have read relates to the sawmill machinery and equipment which is involved in this litigation?

A. Yes.

Q. Will you state whether the item "furniture, fixtures, machinery, equipment" therein referred to, includes any motor vehicles or moving equipment? A. No.

Q. Now, to whom were payments of premiums made for the insurance policies we referred to?

A. The Urton Company in Missoula.

Q. By Darby Mills? [18] A. Yes.

Q. Now, going back to December 15th, 1950, and referring to your discussion with Mr. Shulman concerning matters of insurance, what, if anything, did you do immediately thereafter?

A. I personally called on Mr. Jenkin of the Urton Company and told him we had effected a bill of sale purchase agreement for the machinery, and that we wanted the coverage, if possible, for the Alex Shulman Company during the period of time they were dismantling the mill. He assured me——

Mr. Smith: Just a minute, we object to that on the ground it is not responsive. We object to it further on the ground that under the policies which have now been admitted in evidence, the policy requirements require that any consent by an agent to an assignment of interest in the policy be in writing, that oral consent is not effective. If this

(Testimony of Ward Rukgaber.)

testimony is for the purpose of establishing oral consent in behalf of Mr. Jenkin or the agent of these companies, we object to it on the ground that the authority of the agent has not been shown.

The Court: I don't think you have yet shown the authority of the agent, but you may go ahead with this testimony if you are going to tie it up.

Mr. Garlington: I don't know whether you want to discuss this in any particular detail at this point. Between the admissions of the answer and the procedure—— [19]

The Court: I don't understand the admission in the answer refers to Mr. Jenkin, or who he is, and that sort of thing.

Mr. Garlington: That will be——

The Court: Maybe we had better discuss it, in any event.

(Jury admonished and excused from the Courtroom, and the following proceedings took place in the absence of the jury:)

The Court: Yes, Mr. Garlington, I understand your position to be that the Urton Company, as a result of the allegations and admissions in the pleadings are established to be general agents?

Mr. Garlington: That plus the precedures.

The Court: And the procedures that have been followed with reference to these.

Mr. Garlington: That's right. Mr. Jenkin, you see, was the party who executed the policy for Urton Company.

(Testimony of Ward Rukgaber.)

Mr. Smith: We are not objecting on the ground that the authority of Jenkin, as agent of Urton Company has not been sufficiently proved; that is, whatever Urton Company had authority to do, we would admit Mr. Jenkin had authority to do, but our point goes deeper than that, and these admissions in the pleadings are as to certain specific things; they had power to collect premiums; they had various powers. It is specifically denied in the answer they had any power to consent orally to an assignment. We say that because the policy itself expressly forbids the oral consent. It goes [20] further and expressly forbids any agent to make any waiver of policy conditions unless the waiver is in writing, and we say the policy itself constitutes a limit on the authority of the agent, and consequently, under the policies in this case, there cannot be any authority to give any oral consent. Our objection goes to those problems.

Mr. Garlington: That is what we are fighting over.

The Court: I have read your brief, of course, and have read the cases you have cited that were available to me. Some of the cases you cited, I didn't have available, and it may be if you could secure them you might give them to me before the two o'clock session starts so I can make a final and definite ruling on this case, but from the cases that were available to me, I don't see your point. The cases have generally held, I believe, that the general agent, who has all of the power of the com-

(Testimony of Ward Rukgaber.)

pany, of the principal, is authorized, and the cases so hold that when the general agent does waive such a provision as is here involved, he may do so, and he is authorized to do so.

Mr. Smith: The problem here is not a problem of waiver. It is a different problem from that. This problem is a problem of taking on a new insurance risk, and doing it orally. It is true we do not allege forfeiture of these policies on the ground there has been a breach of condition with respect to title. We are saying Alex Shulman never became owner of [21] this policy because the contract limitation of the authority of the agent requires any new owner be consented to in writing by the company. It is not a problem of an agent waiving title or ownership or waiving a provision with respect to title. It is a problem of a new contract being created between the company and somebody who heretofore was a complete stranger to the contract; and we recognize that the courts have gone very far in rewriting insurance policies so far as waiver provisions are concerned, but I don't think those cases are applicable to this situation where it is sought to make a new contract between these companies and someone who was a stranger before that.

The Court: Don't you think the cases have held that you can create a contract between—for the benefit of a party—an insurance contract may be entered into for the benefit of a party who is not a party to the contract itself?

Mr. Smith: I don't think it has been done in

(Testimony of Ward Rukgaber.)

cases where the policy provisions are as they are here.

The Court: The cases I have seen and read, the Tuttle case, the Montana case you have cited, it didn't appear in that case that the agent was a general agent.

Mr. Smith: I don't think it is a problem of the extent of the agency; I think it is a problem of fulfillment of the contract. We can dig up some of the cases.

The Court: If you will get me a couple of the other cases, I [22] will be glad to look at them. Otherwise, I do believe you have an existing contract of insurance here. Now, if the general agent, the company, in other words, may then endorse that policy to be made payable to another party as his interests may appear—the company can do that.

Mr. Smith: Yes, there is no question the company can do it.

The Court: Yes.

Mr. Smith: But the question is whether the policy provision which requires it be done in a particular sort of way is a valid provision in the policy, and we believe that where the policy says that assent must be given in wriitng by the company that that in itself is a limitation on the authority of any agent to do it. I talk about general agent; I don't know whether Urton Company is a general agent or not. Certainly they do all sorts of things. I don't think they are general agents to the point they are permitted to rewrite terms of the policy.

(Testimony of Ward Rukgaber.)

The Court: I am afraid that is what the authorities hold, that the company on one hand can't hold out a man as being a general agent, having full authority to write or enter into contracts, make any endorsements and changes, and say he was—they can't give him full authority on one hand and limit it on the other. I think that is what the cases hold. If you have something stronger in the cases not available to me—I just [23] have the Pacific and Federal cases, so if you have one or two of those others that might be of some benefit to me, I will be glad to read them before the afternoon session. However, with reference to the particular question of the agent Jenkin, his authority and position in the thing has not been established, unless you want to agree to it.

Mr. Smith: I don't think we will agree to it, but the objection wasn't aimed at that.

The Court: By the way, do you have proposed instructions?

Mr. Garlington: Yes, your Honor, I am just getting them stuck together here.

The Court: I will say that I don't know why I haven't considered it before, but what is your position, Mr. Garlington, with reference to this bill of sale. In your brief, you say that, as I recall it, they were retaining possession and control of the property in order to, so to speak, protect their purchase money, but that doesn't appear to be the terms of the contract at all.

Mr. Korn: May I explain that position. I think

(Testimony of Ward Rukgaber.)

the testimony of this witness, as well as Mr. Shulman, who entered into this agreement, will establish the fact that they agreed between themselves that this insurance coverage should become effective and protect both. I am sure the testimony will show the intent of the parties that no cancellation of insurance should be made on the part of the Darby Mills, and [24] an endorsement should be made——

The Court: I am not interested in that particularly. What I am concerned with is what is the situation with reference to any insurable interest remaining in Darby Mills?

Mr. Korn: The intention of the parties, and the evidence will show they intended that Darby Mills was protected on the balance of the purchase price.

The Court: Do you think they can create an insurable interest by their own separate agreement? The question of whether or not Darby Mills has an insurable interest will depend upon the result of that contract they entered into, won't it?

Mr. Korn: Yes. I think, shall we say, the collateral agreement, which they can explain, while not appearing in writing, is part of the agreement they made between themselves.

The Court: You can't vary the terms of the agreement.

Mr. Korn: Between the parties you can. These parties don't dispute the terms of the agreement. No third person, under the law, can question the understanding. If the question had arisen between

(Testimony of Ward Rukgaber.)

these two people, if Darby Mills on the one hand, contended the agreement meant one thing, and Shulman contended it meant a different thing, then the agreement would be binding, but I think the parties themselves can come in——

The Court: Can come in and tell us, "This is our agreement, but it doesn't mean we sold the property?

Mr. Korn: It don't contradict the agreement. They had [25] a collateral agreement regarding insurance.

The Court: If Darby Mills didn't have an insurable interest, whether they agreed with Shulman wouldn't make any difference at all. Whether they have an insurable interest is determined by the sale of the property. Now, some of the cases you have cited agree even when you sell property, you may retain an insurable interest when you retain possession of it, and the possession is, and it is understood they are retaining possession in order to protect their interest in the remaining purchase price, but Darby Mills doesn't retain possession here to protect itself at all.

Mr. Korn: Our theory of this now is this: That a layman isn't concerned with the legal implications of the language or of the particular term in that agreement. The Court is interested in determining what the parties agreed upon, and whether or not Darby Mills, through Mr. Rukgaber, intended to retain some kind of interest there by reason of the policies they had in effect. If that was the intent

(Testimony of Ward Rukgaber.)

of the parties, if Darby Mills, as part of this sale, intended they should retain coverage, there is no dispute.

The Court: Darby Mills can intend anything they want to, but if they don't have an insurable interest, they can't get any insurance.

Mr. Korn: But isn't the total agreement, the agreement made between these parties, whether put in writing or not, isn't [26] that the controlling factor?

The Court: Darby Mills may have agreed with Shulman that they were going to retain insurance to protect their interest, they may have agreed to do that, but if they don't have an insurable interest, what difference does it make?

Mr. Korn: Let's assume the evidence will show they intended to maintain control of the property. The agreement says, "Payment shall be made on removal and not later than January 15th." If by that agreement they intended to retain a sufficient interest to be sure payment was made on removal, they still intended to retain some interest.

The Court: You don't have a case like that.

Mr. Smith: Of course, your Honor, we dispute that is the fact.

The Court: That would be a matter of evidence as to whether or not it is a fact or not. I don't see how it is possible for you to come in and say, "Here is our bill of sale transferring title to Shulman," and then come in and say, "That is what it says

(Testimony of Ward Rukgaber.)

there, but we didn't transfer title." Is that what you want to do?

Mr. Korn: If that is the situation, I am wondering what the position of the defendants is in this case. They take the position in the answer that there isn't any insurance coverage on the part of anybody.

The Court: That may be so, or it may be that just Darby Mills [27] is out of the picture. It may be you can arrive at a situation here, I suppose, depending upon what the facts are, that Darby Mills had no insurable interest, so they are out of the picture, they weren't insured. Then, it becomes a question as to whether or not Shulman was insured. Now, maybe Shulman was insured as a result—Shulman had an insurable interest. Maybe as a result of the witness' conversation with the insurance company, or the general agent of the insurance company, and his agreement to protect Shulman, maybe Shulman is protected. That may be the result of it, but no matter what they agreed to, if Darby Mills didn't have an insurable interest, Darby Mills isn't insured. You may arrive at that point in finally disposing of the matter where Darby Mills is out of the picture and Shulman is protected by the insurance policy, and then, of course, you will get into the question—the fact that whether or not proofs of loss were waived by the defendants with reference to Darby Mills, of course, won't have any effect upon Shulman. Do you see what I am concerned with?

(Testimony of Ward Rukgaber.)

Mr. Korn: Yes.

The Court: If you can get me some information on some of these matters around 1:30, give it to me.

Mr. Korn: I just want to clarify this position. Is it the Court's present position that the testimony as to this total agreement is not admissible? Maybe that is a pretty [28] premature question. I just wondered if the Court has reached that point?

The Court: Of course, I don't see how you can say—you can't say the title didn't pass. You can't vary that at all.

Mr. Korn: The agreement doesn't—the parties when they signed that agreement didn't say title.

The Court: They said, "We hereby grant and convey."

Mr. Boone: That is as to title and possession, both.

The Court: It specifically provides possession is transferred.

Mr. Korn: It provides for delivery. The word "Deliver" is in there, your Honor, but nothing is said about title.

The Court: Of course, they don't say the word "Title," but they can't use these other words and not convey title. When they grant it, that is just what they do, change title, and that is all there is to it.

Mr. Korn: I think that the evidence as to the entire agreement, whatever the legal effect of it may be is, still is between these parties who are not

(Testimony of Ward Rukgaber.)

contradicting their own agreement. They simply testify what their agreements are.

The Court: It may be. I would like to have you show it to me. It doesn't seem to be the right thing, without reference to a question of law, for these two people, in the face of their written agreement to come in as against other parties and say, "That is our written agreement, but we didn't mean that at all. We entered into a different agreement entirely." [29]

Mr. Korn: Would the Court like one citation, the case of Greening v. Gazette Printing Co., 108 Mont. 158 at 165?

The Court: Do you have the Pacific citation?

Mr. Korn: Yes, 108 Mont., 158, 165 is the page, 88 Pacific Second, 862.

The Court: Very well, the Court will stand in recess until two o'clock.

(2-hour recess.)

(The jury returned to the Courtroom and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I apologize to you for the long wait at this time when Court was recessed until two o'clock, but counsel and the Court have been in session with reference to legal problems that I explained to you before, and while it is important that we all be present at the time Court is called, this was one of those times when we just had to impose upon you. I apologize.

(Testimony of Ward Rukgaber.)

Proceed. There is an objection pending before the Court:

(The last question, answer and objection read back by the Reporter.)

The Court: You don't object, though, with reference to Mr. Jenkins' position?

Mr. Smith: We are not making any contention here that Mr. Jenkins could not do anything Urton itself could do.

The Court: Objection overruled. [30]

Q. (By Mr. Garlington): To get us back on the track, Mr. Rukgaber, we have heard the reading of the question and your answer to that. What date did that statement you have just heard read take place? A. December 15th, 1950.

Q. Who was present when it was made?

A. I don't know as I understand you.

Q. Who was there when this statement was made?

A. You mean who I made the statement to?

Q. Yes. A. Mr. Shulman and Mr. Craft.

Q. I think you don't understand. After you left the law office with the signed agreement, which is Exhibit 1, the contract of sale, where did you go?

A. I went directly to the Urton Company from the Montana Building.

Q. Who was with you?

A. I went into Urton's alone.

Q. Had you up to that point been with Shulman?

A. Yes.

(Testimony of Ward Rukgaber.)

Q. Where did he go?

A. He went on down the street?

Q. And then you alone went into the Urton Company office? A. Yes.

Q. Now, who was in the office when you went in, if you recall? [31] A. Mr. Jenkin.

Q. Anybody else besides Mr. Jenkin?

A. I don't believe there was.

Q. About what time of day was it?

A. Oh, I would say it was somewhere between three and four in the afternoon.

Q. Is the question that the reporter read there, or the answer he read as given by you a summary of what you said to Mr. Jenkin on that occasion?

A. Yes.

Q. Can you recall for us, as nearly as possible, the words that you used and the reply that Mr. Jenkin made? A. You mean what he told me?

Q. What you told him, Mr. Rukgaber, and what he told you. Let's relate the conversation as fully as you can to the jury.

A. I told Jenkin that we had come to an agreement with this purchase agreement and bill of sale with the Alex Shulman Company, and I would like to have our insurance endorsed to cover them as well as Darby Mills during the process of dismantling. He told me that it could be done and he would take care of it, that I had nothing further to worry about.

Q. Was there a request made of you for a copy of the sale agreement?

(Testimony of Ward Rukgaber.)

A. A copy of the sale agreement?

Q. Yes, by Mr. Jenkins? [32] A. No.

Q. Were any questions asked concerning the nature and extent of the sale by Mr. Jenkin?

A. No.

Q. Were there any requests made of you to furnish or procure any additional information or documents, or do anything further concerning that subject? A. Request by me?

Q. By Mr. Jenkin of you? A. No.

Q. Well, when you left the office, what did you understand was expected of you by way of further conduct concerning the subject of this insurance?

Mr. Smith: To which we object on the ground it calls for a conclusion of the witness, a summary of his understanding.

The Court: Sustained.

Q. Where were the insurance policies, Exhibits 2, 3, 4 and 5 at the time of this conversation with Mr. Jenkin?

A. In the files of Darby Mills in their office at Darby.

Q. Were you requested to send those in to Urton Company for any purpose in connection with this transaction? A. No.

Q. Was anything said about when or how the endorsements would be furnished? A. No. [33]

Q. At the time you went in to see Mr. Jenkin, had the contract, Exhibit 1, been signed?

A. Yes.

Q. Did you have a copy in your possession?

(Testimony of Ward Rukgaber.)

A. Yes.

Q. Did you also have with you the check for a portion of the purchase price? A. Yes.

Q. Was any inquiry made of you as to whether the transaction had been partially or completely performed by Mr. Jenkin? A. No.

Q. What was your understanding, derived from the conversation with Mr. Jenkin, as to whether the insurance coverage was effective from that time forward to include the Shulman Company under the policy?

Mr. Smith: To which we object on the ground it calls for a conclusion of the witness. He may say what was said or done, but not as to his understanding.

Mr. Garlington: I should like to suggest that the legal theory behind this matter is that in part of estoppel, based upon the understandings and beliefs of the parties from the conduct which has been described. I think it is competent to show what his understanding was in relation to that theory.

Mr. Smith: It would be our position we wouldn't be bound by any understanding that he had except such as a normal [34] person would get. He may relate the words, but any understanding he had, whether valid or invalid, is not binding upon the defendants here. If for the purpose of estoppel, we would object to it. It is not material insofar as the plaintiff Shulman is concerned.

The Court: Read the question.

(Question read back by Reporter.)

(Testimony of Ward Rukgaber.)

The Court: I will overrule the objection.

Q. Will you answer the question now, Mr. Rukgaber.

A. It was my understanding from Mr. Jenkin that we, as Darby Mills, and Mr. Shulman would be protected. We had nothing further to worry about.

Q. Protected from what date?

A. December 15th, 1950.

Q. Now, between December 15th, 1950, and the occurrence of the fire on January 2, 1951, did you receive any further communication or word from the Urton Company concerning the insurance?

A. No.

Q. Now, then, we will turn to the subject matter of what property was on the premises at the time of the fire. * * *

(Then follows testimony with respect to the property destroyed and damaged in the fire.)

Q. Now, one more question, Mr. Rukgaber, from any time after December 15th, 1950, has there been a refund of any part of the premiums on these seven insurance policies insofar as the [35] insurance on sawmill machinery and equipment is concerned? A. No.

Mr. Garlington: That is all of the direct examination.

(Testimony of Ward Rukgaber.)

Cross-Examination

By Mr. Boone:

Q. Mr. Rukgaber, in the period of time that you have been connected with Darby Mills, have you been the one who has always taken care of the insurance matters for that company? A. Yes.

Q. For what period did that cover, please?

A. Approximately four and a half years.

Q. And during that period of time, you were the one who arranged for the insurance policies that were written for the company, and also were the one who filed proofs of loss for the various fires the company had, were you not? A. Yes.

Q. And in your capacity as the secretary and also the general manager of this company, and in relation to your insurance matters, you did have occasion from time to time to stop in to see Mr. Jenkin of the Urton Company Agency?

A. Yes.

Q. And as a matter of fact, it is true, is it not, that you made a practice of stopping in to see Mr. Jenkin on occasions even when you had no business with him relative to the question [36] of insurance matters? A. No.

Q. Did you not make it a practice to drop in and pass the time of day and so on with him from time to time when you were in Missoula?

A. No.

Q. You want us to understand the only time you stopped to see him at the Urton office was when

(Testimony of Ward Rukgaber.)

you had some business with him relative to insurance matters? A. Yes, sir.

Q. Prior to the date of December 15th, there were pending insurance matters between you and Mr. Jenkin, were there not? A. Yes.

Q. There were matters that related to the revaluation of the property that was covered by these policies, was there not? A. Yes.

Q. And you and Mr. Jenkin were in the process of working on that both prior and subsequent to December 15th, 1950? A. Yes.

Q. And, as I understand it, there was certain revaluations that would have to be obtained from you and agreed to by the Company before new policies could be written on the property which was covered by these particular policies when those policies expired? [37] A. No.

Q. Isn't that so? A. No.

Q. What was the revaluation with reference to then, sir?

A. The revaluation was on the renewed policy.

Q. Your previous statement was that you did have these matters of revaluation under way both prior to and subsequent to December 15th, 1950?

A. They were prior to, yes.

Q. And some subsequent to?

A. I think not.

Q. You recall of no communications or conversations with Mr. Jenkin subsequent to December 15th with respect to revaluations?

A. State that again, please?

(Testimony of Ward Rukgaber.)

Q. I say, do you recall of any conversations or communications with Mr. Jenkin subsequent to December 15th with respect to revaluations?

A. You mean prior to that time?

Q. No, I said subsequent, sir. A. No.

Q. Now, at the time this matter of disposing of this equipment came up, as I understand your testimony, you did quite a bit of work in determining or trying to determine the value of this sawmill equipment prior to entering into this [38] agreement with Shulman Company?

A. Yes. * * *

(Then follows testimony with regard to the property destroyed or damaged in the fire and its value.)

Q. Mr. Rukgaber, under the terms of this instrument which has been introduced here as Plaintiffs' Exhibit 1, entitled, "Bill of Sale and Purchase Agreement," the total price is stated as $6,750, of which $3,375 was paid at the time of the execution of the agreement according to the terms, and the balance of $3,375 was payable to you or to your company upon the completion of the removal of the items of equipment, but in no event later than January 15th, 1951. Was that balance of $3,375 paid to Darby Mills by Shulman.

Mr. Garlington: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. No.

(Testimony of Ward Rukgaber.)

Q. And it hasn't been paid up to this date?

A. No.

Q. As a matter of fact, Darby Mills, Incorporated, started an action in the District Court of Ravalli County against Alex Shulman Company to recover $3,375, has it not?

Mr. Garlington: Same objection.

The Court: Sustained, what is the purpose?

Mr. Smith: The purpose is to show what interest the [39] witness has in this lawsuit. Our purpose was to show what happened in this proceeding and to ask further inquiries as to things in the proceedings, and to show just what status Darby Mills and this witness has in this proceeding at the present time. We think it is always competent to show what the witnesses——

The Court: Aren't you going pretty far afield? He says, "No, he hasn't been paid."

Mr. Smith: Of necessity cross-examination is exploratory.

The Court: But that is the final answer you are looking for, isn't it?

Mr. Smith: No, we want to find out if any agreements contingent upon this lawsuit were made, or what the circumstances are.

The Court: You don't go into exploratory fields of that nature. I'll sustain the objection.

Mr. Smith: May we make an offer of proof?

The Court: Yes. You don't have to take time now. Make it and we will discuss it later.

Q. (By Mr. Boone): Let me ask you this, sir,

(Testimony of Ward Rukgaber.)

since the 25th of June, 1951, has there been any agreement made between Darby Mills, Incorporated, and Alex Shulman or Alex Shulman Company with respect to the payment of this $3,375, bearing in mind the outcome of this litigation?

Mr. Garlington: Objected to as incompetent, irrelevant [40] and immaterial, improper cross-examination.

The Court: Sustained.

Q. On your direct examination, Mr. Rukgaber, you were asked with respect to the preparation of this agreement, Plaintiffs' Exhibit 1, on December 15th, 1950, is that true? A. State that again?

Q. On direct examination you were asked with respect to the preparation of this agreement, Plaintiffs' Exhibit 1, on December 15th, 1950?

A. Asked what?

Q. You were asked in regard to the preparation of this agreement? A. Yes.

Q. And I believe that you stated that the agreement was prepared in the office of Murphy, Garlington and Pauly, attorneys? A. Yes.

Q. Those attorneys are here in Missoula?

A. Yes.

Q. And that firm of attorneys had been, prior to the 15th of December, 1950, the attorneys for Darby Mills, Inc.? A. Yes.

Q. They had handled the business of that company ever since its formation, had they not?

A. Yes. [41]

(Testimony of Ward Rukgaber.)

Q. In fact, they were the firm that incorporated the Company? A. Yes.

Q. And so that firm of attorneys were representing Darby Mills on the day of this agreement and in the preparation of this agreement?

A. Yes.

Q. Now, actually, the agreement was drawn by Mr. Pauly of that firm, was it not? A. Yes.

Q. Now, on your direct examination you were asked this question, "Now, at that time and place"—referring to the time of the preparation of this agreement here in the offices of Murphy, Garlington and Pauly—"Mr. Rukgaber, was there any discussion between you and Mr. Shulman concerning the matter of insurance coverage on this property?" and your answer to that was. "Yes." Do you remember making that answer, sir? A. Yes.

Q. So that in the office of Murphy, Garlington and Pauly this matter of insurance first arose?

A. Yes.

Q. And the matter arose prior to the actual writing of this agreement? A. No.

Q. Was it after the writing of it?

A. Yes. [42]

Q. Was it before the agreement was signed?

A. No.

Q. Was it after the agreement was signed?

A. Yes.

Q. But, at any rate, it happened in the offices of the attorneys on that day? A. Yes.

Q. And I take it you were present, Mr. Shul-

(Testimony of Ward Rukgaber.)

man was present and Mr. Pauly was present?

A. Mr. Pauly was not present.

Q. After the agreement was signed, did you and Mr. Shulman sit around the office in the absence of Mr. Pauly? A. Yes.

Q. But you are sure it took place in Mr. Pauly's office? A. Yes.

Q. On the 15th of December, 1950?

A. Yes.

Q. Was that the only time that the matter was discussed before you saw Mr. Jenkin on that day?

A. We discussed it further in the elevator and on the street.

Q. But the discussion which you have related here on your direct examination took place in Murphy, Garlington and Pauly's office?

A. Yes. [43]

Q. Where was Mr. Pauly at the time?

A. He was out at his stenographer's desk.

Q. Was he dictating other papers in connection with this transaction? A. I don't know.

Q. Had you finished your business with Mr. Pauly at that time? A. Practically.

Q. Was there any occasion for you to be waiting for him?

A. We had another question we wanted to ask.

Q. Did that relate to insurance? A. No.

Q. Did you, prior to the time this agreement was prepared, did you or Mr. Shulman or anybody else present mention the matter of insurance to Mr. Pauly? A. No.

(Testimony of Ward Rukgaber.)

Q. Did all of the conversation you have related here take place in the absence of Mr. Pauly?

A. Yes.

Q. Did all of the conversation that you have related here take place in the offices of Murphy, Garlington and Pauly?

A. I think I answered that, didn't I?

Q. If you did, I am sorry, I didn't get it.

A. We discussed it in the office and in the elevator and on the street. [44]

Q. You stated that when you went down to see Mr. Jenkin and made this statement to him that you have related here, that that was in the afternoon?

A. Yes.

Q. Did he have your insurance file out at the time, sir? A. No.

Q. Would you recall that he made any notation on a file while you were present on that day?

A. He made a pencil notation on the pad on his desk.

Q. You are sure it was on a pad? A. Yes.

Q. Did you hapepn to see what the pencil notation was? A. No.

Q. You only saw him make one notation?

A. Correct.

Q. Now, isn't it a fact that you went in to see Mr. Jenkin on this occasion for the purpose of discussing with him the matter of revaluations on your property at Conner? A. No.

Q. Isn't it a fact that on this occasion, on this 15th of December, the only thing you told Mr.

(Testimony of Ward Rukgaber.)

Jenkin was that you were selling the equipment to Shulman? A. No.

Q. You at that time had in your possession at Darby all of the insurance policies? [45]

A. Yes.

Q. Did you, at that time, offer to wait in Mr. Jenkin's office until these endorsements were prepared? A. No.

Q. Was there any discussion as to how long it would take to prepare the endorsements?

A. No.

Q. Was there any discussion as to when the endorsements would be prepared? A. No.

Q. Was there any discussion as to whether those endorsement that I requested? A. No.

A. Yes.

Q. What was said in that connection, please?

A. He said, "Ward, when they are ready, I will mail them down to you."

Q. This was on the 15th of December?

A. 1950.

Q. At any time between the 15th of December and the 2nd of January, not having received endorsements from Mr. Jenkin, did you either call him or write him to say, "I haven't received the endorsements that I requested? A. No.

Q. Do you recall, sir, having received some forms from Mr. Jenkin on or about the 29th day of December, 1950, relative to [46] revaluation of property covered by these policies? A. No.

Q. You don't recall that. Do you recall having

(Testimony of Ward Rukgaber.)

sent those forms back to Mr. Jenkin the early part of January, 1951? A. No.

Q. Would you say that you did not receive the forms from him and had not returned them, or just that you don't recall? Which would you say, please?

A. State that again.

Q. Would you say you had not received the forms I am talking about and sent them back, or that you don't recall receiving them and sending them back?

A. I don't recall receiving any forms.

Q. And you don't recall receiving any communications from Mr. Jenkin on or about the 29th of December, 1950? A. No.

Q. After this fire took place on the 2nd of January, you had occasion, did you not, to be in Missoula on the 14th day of January, 1951?

A. That I couldn't say.

Q. Well, would it refresh your recollection any, Mr. Rukgaber, if I were to tell you on that day that you called upon Mr. Jenkin at his office and that the two of you then went to the office of Harry Noel, the fire insurance adjuster? Do you remember that occasion? [47]

A. I can remember an occasion of that kind, yes.

Q. Do you remember on that occasion there was present in Mr. Noel's office, Mr. Noel, Mr. Jenkin and Mr. Howard Speer, a special agent of the Atlas Insurance Company? A. Yes.

Q. The four of you. Do you remember on that occasion that there was a conversation between the

(Testimony of Ward Rukgaber.)

four of you with respect to the fire and with respect to the matter of insurance coverage?

A. I think there was some discussion on it, yes.

Mr. Smith: While Mr. Boone is looking for those papers, I will submit to the Court an offer of proof with respect to this cross-examination.

Defendants' Offer of Proof 1

"Defendants by cross-examination of the witness Rukgaber now on the stand want to develop the fact that an action was commenced on June 25th, 1951, by Darby Mills, Inc., against Alex Shulman in the District Court of Ravalli County to recover the balance of $3,750 due under Ex. 1 in this case, and that an attachment was levied in that action and that funds of Alex Shulman in the amount of $3,750.00 were attached. That subsequently the attachment was dissolved by stipulation. Defendants seek to inquire whether this was on agreement between Darby Mills and Alex Shulman at the time the attachment was dissolved [48] under which arrangements were made by which Alex Shulman would pay Darby Mills if Darby Mills would join in and assist in the prosecution of this action."

The Court: Go ahead, and I'll rule on this after Mr. Garlington has had an opportunity to see it.

Q. (By Mr. Boone): Do you recall on that occision in Mr. Noel's office you were asked by Mr. Speer whether at any time during the transaction with the Shulman Company you had agreed to assign any interest in the insurance to the Shulman

(Testimony of Ward Rukgaber.)

Company? Do you recall being asked that question, sir? A. No.

Q. You don't recall making an answer of "No" then to that question? I will ask you if you were asked the question at that time if you had discussed the question of insurance with Mr. Shulman and answered "No" to that question?

A. No, I don't remember that either.

Q. Did you recall at that time that Mr. Jenkin was asked in your presence by Mr. Speer if he had ever been requested to assign the insurance policies or any part thereof to the Alex Shulman Company, and Mr. Jenkin's statement of "No" to the question. Do you remember that, sir?

A. No, I don't. I am just trying to remember back quite a little ways on some things that happened some time back. It is a hard proposition.

Q. Do I understand you would deny, or do now deny, that these [49] conversations I have related actually took place?

A. I wouldn't deny them.

Q. I say would you now deny that those conversations took place at that time?

A. I can't say I would deny them, but I don't recall them.

Q. You were also questioned on your direct examination by Mr. Garlington with respect to the proof of loss which you signed in connection with the fire, were you not? A. Yes.

Q. And one of the items of coverage under these fire insurance policies was item number 1, referring

(Testimony of Ward Rukgaber.)

to sawmill building, $2,000. That building was detroyed by this fire, was it not? A. Yes.

Q. And also item number 2, the blacksmith shop, frame, that was destroyed by the fire?

A. Yes.

Q. Were those the only two buildings in the schedule that were destroyed by fire, or were there other buildings, sir?

A. They are the only two that were destroyed by that fire.

Q. Items 1 and 2, so far as buildings were concerned? A. Yes.

Q. And the proofs of loss which you submitted to each one of the seven insurance companies were with relation to the two building items?

A. Yes. [50]

Q. And the insurance companies accepted the proofs of loss on those items and paid you for them?

A. For the buildings, yes.

Q. In other words, there was never any question raised by the insurance companies of the right of the Darby Mills to recover insurance on the two building items, was there?

A. None to my knowledge.

Q. And promptly after the submission of proofs of loss with respect to those, you were promptly paid?

A. Within a reasonable length of time.

Mr. Smith: That would be all, I think, we have on cross-examination, except for the matters mentioned in the offer of proof.

(Testimony of Ward Rukgaber.)

The Court: Mr. Garlington, when was this action commenced in this Court?

Mr. Boone: In January, 1952, your Honor.

The Court: Is there an objection to the Defendants' offer?

Mr. Garlington: The plaintiffs object to the defendants' offer of proof 1 for each of the following reasons: it is incompetent, irrelevant and immaterial, improper cross-examination, and would not serve in any respect to bear directly on the interest of the witness, and would be so remote as to be inconsequential in that respect.

The Court: I will overrule the objection to the offer, and you may proceed. [51]

Mr. Garlington: May our objection go then as stated to all interrogation?

The Court: All interrogation under the offer of proof, yes.

Q. (By Mr. Boone): Mr. Rukgaber, did your company on June 25th, 1951, commence an action in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli, against Alex Shulman Company, copartnership consisting of Louis Schwartz, Harry Schwartz and Alex Shulman, to recover the sum of $3,375, together with interest at the rate of six per cent per annum from January 15th, 1951, until paid, under the agreement which has been introduced here in evidence as Plaintiffs' Exhibit 1?

A. I was informed that it had been started, yes.

Q. And your company, Darby Mills, Incorpo-

(Testimony of Ward Rukgaber.)

rated, in that action, caused an attachment to be issued attaching the funds of the defendant Alex Shulman Company in the State Bank of Somers, Montana, in the amount of $3,500?

A. I was told it had been, yes.

Q. I will next ask you if, on the 12th day of December, 1951, your company, through its attorneys, caused that attachment to be released of the funds in the State Bank of Somers, Montana?

A. I was told it had been released.

Q. Now, under what arrangements between Darby Mills and Alex Shulman were those funds released? [52] A. I couldn't answer.

Mr. Garlington: I should like to make a special objection on each of the same grounds. It seems to me it is even more remote and even further away from any legitimate range of cross-examination; further, it appears from the answers of this witness that his information is all second hand or hearsay.

The Court: That is so. You might ask him if he made any arrangements.

Q. I will ask you if you, either directly or indirectly, through your attorneys, made any arrangements with Alex Shulman, either directly or with his attorneys, with reference to the release of these funds from the attachment? A. I did not.

Q. Can you tell us what member of your company had anything to do with that matter?

A. The president of the corporation.

Q. Is he present in Missoula or in Montana?

A. No.

(Testimony of Ward Rukgaber.)

Q. Was that matter handled by him in connection with his attorneys, Murphy, Garlington and Pauly of Missoula?

A. So far as I know, it was.

Mr. Boone: That is all. [53]

Redirect Examination

By Mr. Garlington:

* * *

(First on redirect examination was testimony with regard to values of property destroyed or damaged in the fire.)

Q. Now, counsel asked you concerning the details of the signing of this contract, Exhibit 1, in our office, and the matter of the discussion of the insurance between you and Mr. Shulman, and asked you particularly where Mr. Pauly was, what he was doing, what you were doing, and so on. Just to put the picture together, did you describe, or would you describe the sequence of events leading from the time the Exhibit 1 was signed until you left the office?

A. Well, I don't know as I recall exactly what took place. After we signed the agreement, Mr. Pauly went, as far as I know, out to the stenographer's desk, and Mr. Shulman and I sat there alone in the office for a few minutes until Mr. Pauly returned, but what I had on my mind, or what Al and I had on our minds to ask him at that moment, I couldn't tell you. It has been quite awhile ago.

(Testimony of Ward Rukgaber.)

Q. But, in any event, the discussion concerning insurance was private between you and Mr. Shulman, I take it? A. Yes.

Q. And continued there in the office and on your way downstairs and out on to the street? [54]

A. Yes.

Q. Now, counsel also asked you whether you had ever telephoned to Mr. Jenkin between December 15th and the time of the fire inquiring about these endorsements, and your answer was you had not. Would you tell the jury why you had not?

A. I had always in the past dealings with Mr. Jenkin of Urton Company been able to rely on his word. When he told me, regardless of what the insurance matter was, that it would be taken care of, it was. I didn't question in my mind at all his ability.

Mr. Garlington: That is all.

Recross-Examination

By Mr. Boone:

Q. In other words, you had always found Mr. Jenkin had taken care of your insurance matters promptly with dispatch and efficiently?

A. Yes.

Q. That covering an experience over a period of four years that you had been dealing with him?

A. Yes.

* * *

(Testimony of Ward Rukgaber.)

(The remainder of the testimony of this witness was with regard to the property destroyed in the fire.)

Mr. Boone: That is all.

(Witness excused.) [55]

ALEX SHULMAN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Korn:

Q. State your full name, please?

A. Alex Shulman.

Q. Where are you engaged in business?

A. In Seattle and in Somers.

Q. Seattle, Washington, and Somers, Montana?

A. That's right.

Q. What is the nature of your business, Mr. Shulman?

A. I buy and sell used machinery and equipment.

Q. How long have you been engaged in that type of business now? A. About 15 years.

Q. With reference to the matter of the property that was sold to you by Darby Mills that has been referred to in this case, would you tell the Court and jury how you happened to deal with Darby Mills in the first place? Have you any interest, have you had any interest at all in Darby Mills?

(Testimony of Alex Shulman.)

A. No.

Q. You have never had any prior connection prior to the purchase of this?

A. None at all. [56]

Q. Would you explain how you happened to have any dealings with Darby Mills?

A. Well, originally I saw their ad in the Timberman, which is a magazine, a trade magazine that goes to the lumber trade.

Q. Where is that published?

A. I don't know where it is published.

Q. Did you see it on the Coast?

A. We get it in both places. We have had it in the Somers office and also in Seattle.

Q. You noticed in this trade magazine this property at Conner near Darby was for sale, is that it?

A. That's right.

Q. You made inquiries concerning it?

A. Yes.

Q. Did you, at any time, make any trip to Darby to look at the property, or make any investigation of it?

A. Yes, my first trip was, I believe, about the middle of November or early part of November, 1950.

Q. And after inspecting the property, did you make any offer to the Darby Mills?

A. Yes, I did.

Q. Was that offer made verbally or in writing?

A. No, it was made in writing.

Q. And what did you offer as a purchase price

(Testimony of Alex Shulman.)

for this machinery and equipment in this mill in place? [57]

A. I offered $6,750 and agreed to remove it myself.

Q. In other words, the amount that you indicated in your offer you were willing to pay for it was for it as it was in place at the time. You assumed the responsibility of dismantling it. That is the same figure shown in the agreement, is that right? A. Yes.

Q. After you made this offer, did you receive any communication or any acceptance of it from Darby Mills?

A. Yes, I was—I believe I was in Somers at the time. In any event, I was called on the phone and told they were accepting my offer, and asked if I could come down here to complete the transaction.

Q. About when was that, Mr. Shulman?

A. You mean when they called me?

Q. Yes, when did you arrange to come down?

A. I think the phone call was either the 13th or 14th of December, and I came down on the 15th.

Q. Is that the date on which these negotiations were concluded in Mr. Pauly's office?

A. December 15th, yes.

Q. And it was at that time this agreement that has been introduced here as Exhibit 1, I believe, was made? A. Yes.

Q. With whom did you discuss the matter of the terms of this [58] agreement when you came to Missoula, Mr. Shulman?

(Testimony of Alex Shulman.)

A. With Mr. Ward Rukgaber and Mr. Pauly.

Q. In Mr. Pauly's office?

A. In Mr. Pauly's office.

Q. Was this Exhibit 1, this agreement, drawn in that office as far as you know? A. Yes, it was.

Q. Was this agreement, Exhibit 1, intended to cover all of the items that you were purchasing as a result of your offer, or were there other items not listed at the time in this agreement?

A. There were a number of items that we realized we didn't have on this list, so we covered them by this first sentence here which talks about all machinery of whatsoever kind or nature.

Q. "Used in connection with that certain sawmill building belonging to Seller at Conner, Montana."

A. The understanding was we were to take all the machinery at that particular mill, whether it was on the list or not.

Q. Did you at any time have any dealings with Darby Mills as to the building in which the machinery was located?

A. The only conversation we had was to the effect if we had to move a part of a wall in order to move some bigger pieces of machinery, we would not be obligated to put the wall back. [59]

Q. But you were not interested in the purchase of any building connected with this sawmill?

A. No.

Q. At the time of making this agreement, did you have any agreement with Mr. Ward Rukgaber,

(Testimony of Alex Shulman.)

the gentleman who just testified on behalf of Darby Mills, as to the insurance coverage on this property?

Mr. Smith: We object to this, your Honor, on the ground it tends to vary the terms of the written instrument that is binding upon the parties, and it violates the parol evidence rule, and may that same objection go to the whole line of this testimony?

The Court: You anticipate my ruling, do you? The objection is overruled, proceed.

A. We had some discussion about insurance. I don't quite get the question, Mr. Korn.

Q. My question is, at the time of making the written agreement I have just exhibited to you, Exhibit 1, in Mr. Pauly's office, did you and Mr. Rukgaber, on behalf of Darby Mills, have any discussion or understanding or agreement about any insurance coverage on the property covered by the Exhibit 1?

A. When you say at the time of the making——

Q. On December 15th, 1950?

A. We had a discussion on December 15th in Mr. Pauly's office. [60]

Q. Do you recall—with reference to the insurance matter? A. Yes.

Q. Tell the Court and jury just what that conversation was?

A. Well, I asked—at the time we signed, we were in Mr. Pauly's office twice in order to get the thing straightened out. We were there in the morning, and left and were told to come back late in the

(Testimony of Alex Shulman.)

afternoon, at which time the bill of sale would be ready, and on our second visit up there, we signed the agreement, and I handed Mr. Rukgaber the check, and then we went on to talk about insurance. I asked him if he could get his policies to cover me as well as him during the time we were dismantling the equipment and before we had a chance to move it up to Somers.

Q. Did you and Mr. Rukgaber arrive at any agreement between you concerning that conversation, if it could be done?

Mr. Smith: We object on the grounds it is calling for a conclusion of the witness. He may say what was done. Whether or not there was an agreement depends upon what significance the law gives to the words.

The Court: Sustained. Confine it to what was said.

Q. Just state what Mr. Rukgaber said about what he would do concerning this insurance matter?

A. He said that the agent that wrote all his insurance is right around the corner from the building in which we were in at that moment, and he would walk right down and instruct him [61] to add our names to the policies.

Q. What did you do subsequent to that discussion about this insurance? What did you do, if anything, about carrying out that portion of the understanding?

A. We left the building together and continued the discussion about it as we rode down in the

(Testimony of Alex Shulman.)

elevator and we walked to Urton Company together.

Q. Did you walk there with Mr. Rukgaber?

A. I walked as far as the door; I did not walk in.

Q. Anyone else with you at the time this occurred?

A. Yes, Mr. Craft was with me during all of these conversations that we have been talking about.

Q. Mr. Craft was in your employ at the time?

A. Yes, he was.

Q. He had what capacity with you?

A. He was in charge of our operations at Somers, Montana.

Q. He was your agent there? A. Yes.

Q. Now, did you see Mr. Rukgaber go into the Urton Company office? A. Yes.

Q. Where did you go?

A. I went to the Missoula Mercantile Company.

Q. When did you next see Mr. Rukgaber after that?

A. Oh, it was about, I would say between nine and 10 the [62] next morning.

Q. Where?

A. In Darby at the office of the planing mill.

Q. Did you have any conversation with Mr. Rukgaber the following morning, the morning of the 16th? A. Yes.

Q. At Darby? A. Yes, at his office.

Q. Just tell the Court and jury what was said

(Testimony of Alex Shulman.)

by Mr. Rukgaber to you, or what you may have said to Mr. Rukgaber concerning any matter of insurance?

Mr. Smith: To which we object on the ground it would be hearsay. Any conversation between Rukgaber and this witness would not be binding on the defendant.

The Court: What is your position? I think that is the situation, isn't it?

Mr. Korn: The point of it is to show whether or not there was any reliance placed upon the agreement made the day before with reference to the coverage and what had been done about it.

The Court: Your cause of action is not based upon such a situation as that it requires your reliance upon what?

Mr. Korn: Yes, I would think so. I think the proof would show—that the allegations in the complaint are that as a result of this agreement between Rukgaber and Shulman, [63] nothing further was done about taking out additional insurance on that property between the 15th of December and the time of the fire. The allegations of the complaint are he relied on that agreement and he found out the following day what had been done.

The Court: It is late in the afternoon.

(Jury admonished and left the Courtroom, and there was further argument in the absence of the jury. Thereafter, a recess was taken until 10:00 o'clock a.m., the following morning, April 25, 1952, at which time the following proceedings were had, the jury being present:)

(Testimony of Alex Shulman.)

The Court: Proceed. I didn't rule on that objection with the thought that Mr. Korn suggested he might have some other authority.

Mr. Korn: We won't press the matter further at this point.

Q. (By Mr. Korn): Mr. Shulman, as I recall it, yesterday at the time of recess you stated you had gone to Darby the morning following the making of this agreement of purchase. That was testified to here yesterday? A. Yes.

Q. That was on December 16th? A. Yes.

Q. And after going to Darby, what did you do, if anything, with reference to the property you had purchased under this agreement? [64]

A. From Darby we went up to the mill near Conner and proceeded to make a preliminary inventory of all of the machinery.

Q. You say a preliminary inventory. You mean it was not complete?

A. No, we didn't intend it to be absolutely complete because certain items of machinery were down underneath the mill and it was almost impossible to see until after dismantling was completed.

Q. Did you place anyone in charge of that property after you purchased it at that time?

A. Yes, I placed Mr. L. A. Hunt.

Q. Who is L. A. Hunt?

A. He is a dismantling contractor.

Q. Where is his residence? A. Spokane.

Q. In other words, his business is that of dismantling machinery of this type, is that it?

(Testimony of Alex Shulman.)

A. Yes.

Q. Has this Mr. Hunt you referred to any interest in Shulman Company or Darby Mills?

A. None at all.

Q. He has none in your business? A. No.

Q. He was simply an employee of yours directly?

A. He was not an employee; he was a [65] contractor.

Q. Do you recall when he went up to take possession and start this dismantling, how soon after that?

A. He met us in Missoula on the same night, the night of the 16th and went from there to the mill.

Q. What instructions, if any, did you give to Mr. Hunt with reference to what he should do with this property you purchased, this machinery and equipment?

A. I told him to completely dismantle the mill; I told him what all we had purchased; I told him that I would mail him a copy of this inventory I had taken that day as soon as I had it typewritten; I told him to keep a complete record as to what he dismantled and check it off against the inventory, and if he found anything I hadn't already inventoried, to add it on to the inventory. I told him we had that same day sold, I believe, three items; I told him about where they were to be delivered.

Q. Did you have any understanding with him, or instruct him to make any report to you from

(Testimony of Alex Shulman.)

time to time as to what he was doing with this property?

A. Yes, I left here and went back to Seattle and told him to report to me constantly by the phone as to the progress in the dismantling operation, and also as to any sales he might make while he was dismantling, and as to deliveries. In other words, most of the material was to be delivered to us at Somers. As he delivered it, he was to report to me about that. [66] If he found any additional items, he was to advise me about those.

Q. Did he follow instructions?

A. Yes, we spoke back and forth on the phone, I would say, at least three times a week.

Q. Now, what was done, just by way of segregation here, with this property you purchased after dismantling? You mentioned the fact some of it was taken to Somers, is that correct? A. Yes.

Q. And a few items you sold right from the site?

A. I had sold, I believe, three items on the day of the 16th, and Mr. Hunt sold perhaps another six or eight items during the couple of weeks he was dismantling.

Q. Aside from the items that you sold there from the site of this operation, and the items that were taken to Somers where your other business was being conducted, the rest of it is represented by what was destroyed in the fire, is that correct in a rough way? A. That's right.

(Testimony of Alex Shulman.)

Q. By the way, do you know the date the fire occurred?

A. It occurred on the morning of January 2nd.

Q. At the time of the occurrence of this fire, was this dismantling process you had instructed Mr. Hunt to take care of completed?

A. Removal was not complete, but the dismantling had been **[67] completed.**

Q. How did you learn of the fire?

A. Mr. Hunt called me that morning.

Q. In Seattle? A. Yes.

Q. What did you do upon receiving word of the fire?

A. I called Mr. Jenkin at the Urton Company.

Q. When did you call him?

A. That same morning, January 2nd.

Q. After you received the call from Hunt?

A. Yes.

Q. What did Mr. Jenkin tell you, if anything, concerning the matter?

Mr. Smith: To which we object, your Honor, on the ground it would be hearsay. There is no showing that, irrespective of Mr. Urton's power as agent, that he was an agent empowered to make any admission binding on the companies in this case. I am referring to Mr. Jenkin.

The Court: Overruled.

A. I believe you asked me what Mr. Jenkin told me?

Q. Yes.

A. He told me that he already knew of the fire.

(Testimony of Alex Shulman.)

He had turned it over to Mr. Harry Noel, who is with the General Adjustment Bureau, and I believe he even gave me his telephone number. [68]

Q. Did you do anything further, notify anybody or discuss it at this time?

A. Yes, I called Mr. Noel.

Q. Indicate what your conversation with Mr. Noel was, if you can recall.

A. Well, he told me he was going to make an investigation. He had not yet been up to the mill, and I offered to get together my records and send him a list of what was in the mill at the time of the fire, and that was about the extent of the conversation at that time.

Q. Did you thereafter at any time furnish Adjuster Harry Noel with a list of the property there at the time of the fire?

A. Yes, I mailed it to him on January 9th, I believe.

Q. Do you recall when that list was furnished?

A. I believe it was on January 9th, 1951.

Q. How did you furnish that to Mr. Noel?

A. I mailed it to him.

Q. Was there a letter of transmittal with it?

A. Yes, I believe there was.

Q. Now, this list that we will identify and number was a list of the property that was left at the scene of the fire at the time of the fire?

A. Yes.

* * *

(Testimony of Alex Shulman.)

(Here follows testimony with respect to proofs of [69] loss and the value and extent of the property destroyed or damaged in the fire.)

Cross-Examination

By Mr. Boone:

* * *

(The first part of cross-examination was with reference to value of the equipment destroyed or damaged in the fire.)

Q. When you came to Missoula on the 15th of December, you met Mr. Rukgaber in the office of Murphy, Garlington and Pauly? A. Yes.

Q. And explained to Mr. Pauly the type of agreement that both of you wanted? A. Yes.

Q. And discussed all of the terms and conditions with him? A. We didn't discuss them all.

Q. And as a result the agreement was drawn? A. Yes.

Q. Now, I noticed that the agreement is between a partnership of Alex Shulman Company, a copartnership consisting of Alex Schwartz, Harry Schwartz and Alex Shulman? A. Yes.

Q. Did that partnership remain the same then after the 15th of December until it was dissolved, as you have related? A. Yes. [70]

Q. Going to the part of the testimony with respect to the conversations in Mr. Pauly's office after the agreement was signed, the conversation relating to insurance, I will ask you if this is what each of

(Testimony of Alex Shulman.)

you said at that time: Did you ask Mr. Rukgaber at that time if he carried insurance on the machinery? A. Yes.

Q. Did he tell you that Darby Mills did carry that insurance? A. Yes.

Q. Then did you say, "Could your insurance cover us while we are in the process of dismantling," is that what you said?

A. That is, I believe, close enough. It may not be my exact words.

Q. Did he then tell you that he was not sure, but that he would contact the insurance agent, find out, and advise you?

A. No, he didn't say that he would find out and advise me. He said if it could be done, he would tell them to do it.

Q. Now, have I given the conversation as accurately as you remember it?

A. I believe that is the substance of it.

Q. And all of that conversation took place in Mr. Pauly's office?

A. Either in the office or on the way out of the building, Mr. Boone. We left the building together, rode down in the elevator. I think it is about a block and a half to the Urton [71] Company. We discussed it in a general way until he walked in the door of Urton Company.

Q. You didn't go in Urton Company?

A. No.

Q. Did you stay in Missoula, then, the rest of the 15th?

(Testimony of Alex Shulman.)

A. Yes, that night I stayed in the Florence Hotel.

Q. Were you in town the following morning?

A. Only long enough to have breakfast and then drove to Darby.

Q. You didn't go to Urton Company yourself either on the 15th or 16th?

A. No, I have never been in the office of Urton Company.

Q. When did you return to Missoula after going up to Darby?

A. Saturday night, I think it was about six o'clock. That is the 16th.

Q. Did you stay over then in Missoula?

A. Yes, we did.

Q. But you did not undertake to go to the Urton Company? A. When?

Q. After you returned from Darby?

A. No, I came in here and stayed overnight. Sunday morning I drove to Somers.

Q. You made no effort on the 15th or any other time after the 15th until the second of January to contact Urton Company about insurance? [72]

A. I talked to them on the 2nd of January on the phone, but not in between.

Q. But not prior to the fire? A. No.

Q. When you went up to Darby on the 16th, you stated you, at that time, made an inventory of the equipment? A. That's right.

Q. Do you have that inventory present, please?

A. Yes, I have.

(Testimony of Alex Shulman.)

* * *

(Here follows testimony with respect to the value of property destroyed or damaged in the fire.)

Q. One other question, please, Mr. Shulman. I am referring to an action which was brought against you by Darby Mills, Incorporated, in the District Court of Ravalli County on which you heard some testimony yesterday. Referring to the release of attachment on December 12th, 1951, will you tell us if there was any agreement made between Darby Mills and yourself for the release of this attachment? A. No, there wasn't.

Q. There was no agreement at all?

A. No, sir.

Q. Will you tell us if there was any, if you know, if there was any agreement between your counsel and the counsel for Darby Mills with respect to this action and the release of the [73] attachment? A. None that I know of.

Q. One other question. On your direct examination, you testified concerning the list which you submitted to Mr. Noel, which is the same as Exhibit "C," with the exception of having no values upon it. Did you at any time make a formal proof of loss claim listing the equipment and values to Mr. Noel? A. What do you mean by formal?

Q. Did you ever make a claim for certain property with certain values?

A. A written claim?

(Testimony of Alex Shulman.)

Q. Yes.

A. Not any different than those that we saw this morning.

Q. Just the papers introduced here this morning?

A. Yes, that is all the correspondence I have.

Mr. Boone: That is all.

Redirect Examination

By Mr. Korn:

* * *

(The first part of this redirect examination was with reference to inventories and values of the equipment destroyed or damaged.)

Q. Now, Mr. Shulman, Mr. Boone asked you at length this morning repeatedly whether you had made any efforts to see [74] either Jenkin or Urton concerning this insurance coverage subsequent to December 15th, do you recall that? A. Yes.

Q. I understood you to say that you had not made any effort to get in touch with them?

A. That's right.

Q. Tell the Court and jury why.

A. Because Mr. Rukgaber had already been told——

Mr. Smith: To which we object on the ground it is hearsay.

The Court: It isn't hearsay.

Mr. Smith: We further object on the ground it is incompetent, irrelevant and immaterial.

The Court: What is the purpose?

(Testimony of Alex Shulman.)

Mr. Korn: To explain why he didn't. An effort was made—the inference was that he should have gone to the company to see that the endorsements were made on the policies. The witness has the right to explain why he didn't do the things they infer that he should have done.

The Court: Overrule the objection.

A. Mr. Rukgaber had been told by Mr. Jenkin——

Mr. Smith: Objection. He can't testify to what Mr. Rukgaber was told by Mr. Jenkin.

The Court: Sustained.

A. Mr. Rukgaber told me on December 16th that when he went [75] into the Urton Company office that he had talked to Mr. Jenkin and Jenkin told him——

Mr. Smith: This is hearsay twice removed.

The Court: It is not being offered to prove the truth of the conversation between Rukgaber and Jenkins.

Mr. Smith: May it be understood then it is going in for that very limited purpose?

The Court: Yes.

A. He told me he had talked to Mr. Jenkin——

Q. Who?

A. Mr. Rukgaber. This is on the morning of December 16th when we came out to Darby. Mr. Rukgaber told me Mr. Jenkin had told him everything would be taken care of, and as soon as he had gotten the endorsements together, he would mail them to Mr. Rukgaber. Mr. Rukgaber told me as

(Testimony of Alex Shulman.)

soon as he received the endorsements, that is, Mr. Rukgaber, he would in turn forward them to me.

* * *

(The remainder of the testimony of this witness was with regard to the inspection he made of the property before he purchased it.)

Recross-Examination

By Mr. Boone:

Q. So Mr. Rukgaber then told you when he got the endorsements he would forward them to you?

A. Yes, sir. [76]

Q. And that was on the 16th of December?

A. Yes, sir.

Q. So that not having received the endorsements, I take it that you knew then that Mr. Rukgaber had not received them?

A. I didn't know whether he had or hadn't.

Q. At least during the period from the 16th of December up until the time of the fire, did you make any inquiry of either Mr. Rukgaber or Jenkin with respect to the endorsements?

A. No, it wasn't done yet.

Mr. Boone: That is all.

Mr. Korn: That is all.

(Witness Excused.)

* * *

Mr. Korn: The plaintiffs rest.

* * *

(Thereafter, after plaintiffs had rested, the following motions were made by the defendants in the absence of the jury:)

MOTION FOR NON-SUIT

Mr. Smith: At this time, may it please the Court, the defendants and each of them move that a judgment of non-suit be entered as against plaintiff Darby Mills herein upon the grounds and for the following reasons: First, there is no evidence in this case that Darby Mills Company had an insurable interest in the property involved in this action at the time of the fire; second, there is no proof in this case that the plaintiff, Darby Mills, ever made any proofs of loss with respect to any items of personal property which are now claimed to have been lost in the fire. * * *

With respect to the plaintiff, Alex Shulman, the defendants and each of them move that a judgment of non-suit be entered on the ground and for the reason, first, that Alex Shulman and Company was not, at the time of the fire involved herein, an insured under the various policies of insurance which have been introduced in this case; second, on the ground that no valid assignment of interest in the policies to Darby Mills could be made except in writing, and the evidence fails to show there was any writing transferring these policies or any interest in them, or any writing giving consent to the transfer to Alex Shulman Company; third—and this is a matter that has not been suggested before —we move that the judgment of non-suit be en-

tered on the ground there is no evidence [77(a)] that any assignment of these policies was ever made in fact by the plaintiff, Darby Mills to the plaintiff, Alex Shulman.

(Argument.)

The Court: I am going to reserve ruling on the motion, and we will proceed with the evidence.

Mr. Smith: That is as to both motions?

The Court: With reference to both motions. I may say just offhand I don't say your motion is good as to Shulman, but I do have some concern as to whether or not it is not a good motion as to Darby Mills. Let's proceed with the evidence. Call in the jury. [77(b)]

JAMES D. JENKIN

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. State your name, please?

A. James D. Jenkin.

Q. Where do you reside?

A. Missoula. [77]

Q. How long have you lived in Missoula?

A. Since 1922.

Q. What is your present employment, Mr. Jenkin?

A. I am insurance manager for Urton Company.

(Testimony of James D. Jenkin.)

Q. How long have you been in the insurance business? A. Since September, 1939.

Q. With whom have you been in the insurance business during that period of time?

A. Mr. Urton of the Urton Company.

Q. Are you acquainted with the corporation known as Darby Mills, Incorporated?

A. I am.

Q. Are you acquainted with Ward Rukgaber?

A. I am.

Q. During your experience in the insurance business, did you have occasion to write insurance policies for Darby Mills, Incorporated?

A. I did have.

Q. With whom representing Darby Mills, Incorporated, was your business transacted?

A. Ward Rukgaber.

Q. Over what period, Mr. Jenkin, if you know, did you write insurance for Darby Mills, Incorporated? A. I think it was started in 1948.

Q. Did it continue up to and including the date of the fire [78] we are discussing in this case?

A. It did.

Q. I will ask you if during the month of November, 1950, you had had any negotiations with Darby Mills, Incorporated, relative to some insurance policies? A. I did.

Q. What was the general subject of those negotiations?

A. I was trying to re-establish values for re-

(Testimony of James D. Jenkin.)

newals of policies coming up, and at that time I also sent some checks to him on previous losses.

Q. In connection with renewals of policies, do you remember upon what date some of the insurance which he had at that time would expire?

A. January 28th, 1951.

Q. And your negotiations had been in connection with those expirations? A. Yes.

Q. I will ask you if you remember whether Mr. Rukgaber came into the office of Urton Company on or about the 15th of December, 1950?

A. He did.

Q. When he came into the office on that occasion, Mr. Jenkin, what did he come in to discuss?

A. We were discussing renewals of the present policies, and in the course of the conversation he advised me he had sold the [79] machinery and equipment in the mill to the Alex Shulman Company.

Q. At that time did he make any request of you that the policies then covering Darby Mills be assigned or endorsed to show any interest on behalf of Alex Shulman? A. No.

Mr. Garlington: Objected to as leading.

The Court: Sustained.

Q. Was there any conversation, Mr. Jenkin, with respect to insurance coverage for Alex Shulman Company? A. None.

Q. Did Mr. Rukgaber at that time ask you to determine what the unexpired premiums were with

(Testimony of James D. Jenkin.)

respect to the personal property which was covered by their policies? A. No.

Q. Did Mr. Rukgaber say anything to you with respect to coverage of Alex Shulman during the period they were dismantling the mill?

A. No.

Q. At any time during your conversation with Mr. Rukgaber, did you tell him you would endorse these policies to cover Shulman? A. No.

Q. Did you at any time tell him he had nothing to worry about? [80] A. No.

Q. After Mr. Rukgaber left the office on the 15th, did he ever at any later time come in and discuss with you the matter of the coverage on this personal property?

A. No, not prior to the fire, no.

Q. Did he ever, at any time, prior to the fire write to you with respect to the coverage on the personal property? A. No.

Q. During the testimony of Mr. Rukgaber, he testified to the effect that after the fire and on January 2nd, he called you and that a conversation in substance similar to this took place: That he asked you about the fire and told you about the fire and that you said, "I am sorry that I couldn't get the coverage which I promised you." Did that conversation take place? A. No.

Q. What was the substance of the conversation?

A. He reported the fire. I said I was sorry to learn they had a fire, and I would refer the matter

(Testimony of James D. Jenkin.)

to the General Adjustment Bureau as our office had no authority whatever to handle any claims.

Q. During that time was there any mention of any kind with respect to the personal property covered? A. There was not.

Q. I will ask you, Mr. Jenkin, if at a later time you [81] attended a meeting in the office of Mr. Harry Noel of the Fire Companies Adjustment Bureau at which was present yourself, Mr. Rukgaber, Mr. Howard Speer and Mr. Harry Noel?

A. Yes.

Q. Could you fix the date of that conversation?

A. It was January 14th, if my recollection is correct.

Q. How did you happen to all gather in the office at that time?

A. Mr. Rukgaber came into the office and I took him up to Mr. Noel in regard to the fire loss, and Mr. Speer was in Mr. Noel's office.

Q. Who is Mr. Speer?

A. He is the special agent for the Atlas Assurance Company.

Q. That is one of the defendants in this case?

A. Yes.

Q. What was the general subject of discussion in Mr. Noel's office at that time?

A. Mr. Speer, being interested in the companies interested in the policies asked Mr. Rukgaber if he had discussed insurance in selling the property, and he said, "No."

Q. Discussed insurance with whom?

(Testimony of James D. Jenkin.)

A. With Mr. Shulman.

Q. Was anything said in that conversation relative to whether you had been requested to make endorsements on these policies?

A. There was. [82]

Q. What was that conversation, as nearly as you could tell us?

A. He was asked if he had requested me to endorse the policies, and his answer at that time was "No."

Q. You say he was asked. Who do you mean?

A. Mr. Rukgaber.

Q. Who asked the question?

A. Mr. Speer asked the question.

Q. At any time during the course of that conversation did Mr. Rukgaber say anything to the effect that this property, or this insurance, had been transferred to Alex Shulman Company?

A. No.

Mr. Smith: You may examine.

Cross-Examination

By Mr. Korn:

Q. Mr. Jenkin, how long did you say you had been manager of Urton Company?

A. I started working with Mr. Urton in 1939, and I have been manager down there since 1941.

Q. And the Urton Company is a general agent for the insurance companies, these insurance companies that are defendants in this action?

A. They are.

(Testimony of James D. Jenkin.)

Q. And you work for the Urton Company. What position do you [83] hold with Urton Company?

A. I am manager of the insurance department.

Q. As such manager, you have the power to do whatever the Urton Company has power to do?

A. Yes.

Q. And you stated that, or did I ask you, whether or not the Urton Company represents, has represented these seven insurance companies that are defendants in this action?

A. Yes, they do.

Q. And they have during the entire period of time that you have been associated with this company? A. Yes.

Q. You have written a number of policies covering—fire insurance policies on various types of property during this long experience since 1939, Mr. Jenkin, haven't you? A. Yes, I have.

Q. And you have written probably hundreds of policies for these various companies during that time? A. Yes.

Q. In that capacity as manager and agent for these companies, I suppose you have frequent requests and applications for insurance by various customers? A. Yes.

Q. You are in the habit of writing the kind of insurance they want as far as those companies are able to furnish it? [84]

A. As far as they will permit us to write policies.

(Testimony of James D. Jenkin.)

Q. You have authority to write policies, don't you?

A. We have authority to write policies on such risks as they authorize us to write.

Q. Do you mean by that that if you write a policy, you have to confer with someone in San Francisco or New York for authority?

A. No, we don't. Some classes of risks we have to refer to the company before we are authorized to issue policies.

Q. When you issued these policies involved in this litigation on behalf of these seven companies, you had authority to issue those policies?

A. I had authorities from the companies to issue them.

Q. You did issue the policies to Darby Mills covering these properties? A. Yes.

Q. Now, I'll hand you Plaintiffs' Exhibit 5, for instance, one of these policies. That is your signature on the front page of the policy?

A. That is my signature?

Q. Are you familiar with the signature that appears on the document on the next page?

A. Yes.

Q. Whose signature is that?

A. Terry Urton's. [85]

Q. He has what capacity in the Urton Company?

A. He is the owner.

Q. And the next document on this Exhibit 5, Plaintiffs' Exhibit 5, has a signature on it. Whose signature is that?

(Testimony of James D. Jenkin.)

A. That is my signature.

Q. You made that endorsement?

A. I had the secretary draw it up.

Q. You signed it? A. Yes.

Q. You sent that endorsement to Darby Mills at Darby, Montana? A. Yes.

Q. You sent it to them by mail? A. Yes.

Q. You authorized them to attach it to this policy, is that correct? A. Yes.

Q. And on the next page there appears another endorsement on this same policy, Plaintiffs' Exhibit 5, which bears a signature. Is that your signature?

A. That is my signature.

Q. You made that endorsement in your office?

A. Yes.

Q. Was that likewise mailed out to Darby Mills with instructions that it be attached to this [86] policy? A. It was.

Q. And the following sheet is a long endorsement that bears a signature at the bottom. State whether or not that is your signature.

A. That is my signature.

Q. Was that endorsement made by you on behalf of Atlas Assurance Company and sent to Darby Mills? A. It was.

Q. And you authorized them to attach it to this policy? A. I did.

Q. You have authority, then, Mr. Jenkin, to not only accept applications for original insurance, but also to make endorsements to meet changing conditions under the policy? A. Yes.

(Testimony of James D. Jenkin.)

Q. In the performance of your duties as agent of these various insurance companies, your practice has been to make those endorsements when requested? A. That's right.

Q. Now, Mr. Jenkin, how many customers would you say that your company handles in the course of a year, say? How many policies, fire insurance policies do you write?

A. We write 1,000 or better.

Q. And how many endorsements during the course of a year, for instance, would you normally make on these policies?

A. Well, there is very few endorsements made, excepting a [87] change of ownership, something of that kind.

Q. Isn't it a fact that you make endorsements for the purposes of indicating a change of interest in the property, such as a sale under contract?

A. We do.

Q. Or if a mortgage is given, the policy holder calls up and says, "I have given a mortgage, and I want the policy endorsed to show that interest"?

A. We do upon evidence of a sale or transfer of a mortgage.

Q. Mr. Jenkin, in connection with the conduct of this business you also engage in what is commonly referred to as the binder practice?

A. We issue no binders without we first notify the company that we want a binder. We have no binders in our office whatever.

Q. Just to make it specific since you understand

(Testimony of James D. Jenkin.)

what my question means, Mr. Jenkin, is it not a fact if one of your customers calls you up and says, "I have just bought a piece of property. I haven't time to come down to see you. It is located so and so, I want it covered by insurance to protect me." Isn't it a fact you say in the course of practice, "Very well, John, or Harry, you can consider it covered as of today"?

A. We first ask the amount and write the policy as soon as possible and thereafter take the application. Everything is handled by application of the insured. [88]

Q. Would you deny you ever tell the man or woman who calls you for immediate coverage on that sort of thing, would you deny you have ever told them, "You are covered as of now"?

A. I never denied we say, "You are covered as of now," and write the policy as soon as possible thereafter.

Q. You date it back so it bears the date of the request?

A. We do it as of that day, if possible, if not, it is done the next morning. We don't carry anything over from one day to the next; if it is possible we take care of it the same day.

Q. It is a fact that you do issue coverage, or you tell your client that he can consider the property covered as of the time he makes the request, and the policy will be sent to him in due time?

A. Yes, we do that.

Q. You date the policy, whether it is the next

(Testimony of James D. Jenkin.)

day or the following day, you date the policy from the time of the request?

A. From the time of the request.

Q. To cover him from the time of the request, is that right? A. Yes.

Q. You follow the same practice, Mr. Jenkin, with reference to the making of endorsements on policies? If a man calls you up and says, "I have sold the property or given a mortgage and I want the proper endorsement to be placed on this policy," you get the facts and say to him, "O.K., I will take care of it"? [89]

A. When the facts are presented to us, we take care of it then, but we don't take anybody's word for a mortgage until we are satisfied there is such a mortgage issued.

Q. With reference to endorsements on change of interest, do you tell him, "O.K., I'll see you are protected"? Suppose a man buys a piece of property under contract. He calls you up and says, "Mr. Jenkin, I bought this property, I want to be covered as of now." You mean to say you wait until he brings in the conditional sales contract before issuing him a policy and telling him it is going to be covered?

A. It all depends on the type of risk.

Q. I am talking about the ordinary type of insurance coverage that would be for fire protection.

A. The ordinary type of insurance coverage, why we would issue it and hold it there until we had proof that there was such a contract issued.

(Testimony of James D. Jenkin.)

Q. And this matter of requesting endorsements on policies by policy holders is very common, a very common practice, isn't it?

A. It is a common practice.

Q. These policies, Mr. Jenkin, I think you stated, were dated in 1950. For the sake of establishing a period of time, let us say as of December 15th, 1950, as a beginning point, how many policies would you say you have written, just an estimate? How many policies would you say you have written since [90] December 15th, 1950, in connection with these companies you represent?

A. I couldn't give you any definite figure.

Q. Well, an estimate, just an estimate?

A. Well, we will say 50 at the present time, about, a year, and I have—about 750 or so.

Q. About 750 policies. I suppose the issuance or making of endorsements on policies that have been issued is as frequent or more frequent, perhaps, than even the issuance of original policies, I mean changes occur——

A. You issue policies more frequently than endorsements.

Q. How many endorsements on these 750 policies issued since December, 1950, would you say you have made, an estimate, please?

A. Well, your endorsements on policies—we don't have, I wouldn't say, 10 per cent of them are endorsed after they are issued.

Q. What?

(Testimony of James D. Jenkin.)

A. Ten per cent after issuance we put endorsements on.

Q. Only 10 per cent. Mr. Jenkin, in addition to the fire insurance business which you have indicated you conduct through Urton Company for the purpose of fire coverage, isn't it a fact you issue a lot of other types of insurance policies, for instance, automobile insurance? A. We do. [91]

Q. Public liability insurance and all that sort of thing? A. Yes.

Q. What would you say the total per year, total volume of policies issued by your company per year would amount to? A. Well——

Q. On all coverages? A. About 25,000.

Q. To make sure that I understood your answer there, when you said 25,000, did you mean policies, actually the number of policies?

A. The number of policies? You asked me the value of policies.

Q. No, the number of policies.

A. Well, in the other coverages, I would say we write about 200 per year, various other coverages beside fire.

Q. 200 a year? A. Yes.

Q. Now, you stated on direct examination, Mr. Jenkin, that Mr. Rukgaber did come to your office on December 15th, 1950? A. Yes.

Q. And you stated, I believe, that you denied that he made any request for the endorsement of any policy at that time, is that right?

A. No request was made of me.

(Testimony of James D. Jenkin.)

Q. Now, had Mr. Rukgaber been in to your office any time [92] immediately preceding that occasion?

A. Preceding the 15th. He had been in there before, yes, he had been in several times before the 15th.

Q. I said immediately preceding, shortly before?

A. Shortly before the 15th, no. That was the first time he was in there for some time.

Q. When he came in on December 15th, what time of day was it?

A. Some time in the afternoon, I don't know exactly what time it was.

Q. Would you state to the Court and jury just what the conversation was, what you said, and what he said when he came to your place on December 15th, 1950?

A. I was trying to establish values.

Q. I am asking you what you said and what he said, not a narration of it.

A. In establishing fire values, I had asked Mr. Rukgaber about fire values in order to renew his policies which were expiring January 28th. In the course of the conversation, Mr. Rukgaber said he was selling the machinery and equipment to Alex Shulman Company.

Q. You want the jury to understand when he came into your office December 15th, 1950, you were the one that opened the conversation by suggesting to him that he had a policy that was about ready to be renewed? [93]

(Testimony of James D. Jenkin.)

A. I had been corresponding before that, and sent out a number of checks and mentioned about a new statement of values. I thought Mr. Rukgaber was in there for that purpose.

Q. Go ahead with your conversation. Just what did Mr. Rukgaber tell you December 15th, 1950, at the occasion of this conversation you have just referred to?

A. As near as I can remember the conversation, we talked about new values and in the course of the conversation he mentioned that he had sold the property to Alex Shulman, was selling. I probably should say not sold, but was selling.

Q. You can't recall any specific statement Mr. Rukgaber made to you on that occasion?

A. Other than he was selling the property is the only thing I can recall. I have a note in my file that he was selling the property to Alex Shulman Company.

Q. That was all he said? A. Yes.

Q. Did you ask any questions about it?

A. No, I didn't.

Q. That was December 15th. When did you see him next, subsequent to that time, concerning this renewal matter on these policies?

A. Some time in the latter part of December. I sent him up a blank form to set out his values for his buildings, because on insurance policy coverage, we have to submit a new set of [94] values to the fire board each year to get the established rate.

Q. Within the latter part of December, within

(Testimony of James D. Jenkin.)

two weeks, you made out some new forms to send to him for the purpose of renewing the same insurance?

A. For establishing values for renewal policies, yes.

Q. At the time you sent those out, you didn't send any request or make inquiry of him or ask any questions about endorsements, or whether or not he had made any sale?

A. I did mention if Alex Shulman Company got their stuff out he said they were selling. I figured he had sold it, but I wanted to find out.

Q. You had a conversation with him concerning that matter on the 15th of December?

Mr. Boone: No. If your Honor please, the witness said that was a letter, a subject of correspondence.

The Court: Yes, but let him inquire. Was that in a conversation on December 15th?

A. December 15th was the conversation.

Q. That is the conversation you have just narrated; and later on, some time in December——

A. I sent blank forms for a new statement of values.

Q. That is all you sent him?

A. Yes, and I asked him in the letter if Alex Shulman Company had removed any of the [95] stuff.

Q. Have you a copy of the letter you sent him?

A. I have in the office.

(Testimony of James D. Jenkin.)

Q. Will you produce it, please, and we will have it for our next session? A. O.K.

Q. But you didn't subsequently see him concerning the matter of these endorsements or what had been done between the time of this conversation on December 15th, and the time of the loss in January, you had no further conversation with Mr. Rukgaber? A. No.

Q. Did you have any difficulty in dealing with Mr. Rukgaber on matters of insurance prior to that?

A. No, I have never had any trouble with Mr. Rukgaber in dealings.

Q. Did you on prior occasions in connection with these policies follow the practice of following his request for the issuance of a policy or the renewal or make an endorsement?

A. Following his request it was sent in and the companies approved the risk and I followed out the request.

Q. Now, after December 15th, 1950, did you make out any new policies to replace these, contemplating to deliver them?

The Court: What are you talking about? Are you referring to these specific policies?

Mr. Korn: Yes.

A. There was renewal policies issued for a reduced amount. [96]

Q. Those policies were actually written up?

A. They were written up upon a statement of

(Testimony of James D. Jenkin.)

values that was submitted to our office and sworn to.

Q. Did you send those new policies you have just referred to now which were to replace the others, did you send those new policies to the Darby Mills?

A. I did.

Q. On what date?

A. I can't remember the date they were sent out.

Q. You are positive of that?

A. They were sent out some time before the expiration of the policies, but I can't remember the date. It was in January some time.

Q. In January? A. Yes.

Q. Well, would it be, say the 20th, what would be your practice on that?

A. We send them out as soon as we can get the average rate from the Fire Rating Bureau's office and can write the policies.

The Court: What insurance are you talking about; you sent out renewal insurance on what property?

A. On the property of Darby Mills that was left after the fire.

The Court: What kind of property? [97]

A. Buildings, and there is one item of personal property.

The Court: Would you call a policy a renewal policy—handing you Exhibit 3, did you issue a renewal policy on that property in January of 1951?

A. We issued it on a new policy form, with a

(Testimony of James D. Jenkin.)

new form attached to it setting out the various coverages.

The Court: Covering the same property?

A. Not all the same property.

The Court: Some of the same property?

A. Some of the same property. We use the term, renewal of that policy, for the companies' information that they have been on the risk before, and they know if we had authority to issue such a policy on a risk of this kind.

The Court: Do you have a policy that was a renewal of this particular policy, Exhibit 3?

A. Those are sent in for cancellation, they were cancelled out.

The Court: You don't have those policies now?

A. No.

The Court: Proceed.

Q. Those renewals you say they were cancelled out, the policies you issued as renewals were returned to the insurance company, is that right?

A. Yes.

Q. If I understood you correctly, you say you didn't have [98] any further conversation between Mr. Rukgaber and yourself between the 15th and the time of this fire, is that right?

A. Never had any other conversation.

Q. But you did know as of December 15th, 1950, that Mr. Rukgaber had sold this property?

A. He said he was selling it.

Q. And at no time, you at no time then did you follow your practice between December 15th and the

(Testimony of James D. Jenkin.)

end of the month, say, of either finding out from Mr. Rukgaber what property had been sold or what endorsement had been made, despite the fact you had discussed the matter of the sale with him and knew there might be a transfer of interest?

Mr. Smith: Objected to on the ground it is misleading and refers to a practice. He says, "You didn't follow your practice." This witness hasn't testified as to any practice of making endorsements on policies on merely being advised there is a change of interest in the absence of a request.

The Court: Sustained.

Q. As far as you were concerned, Mr. Jenkin, you did nothing further about this matter of the transfer of interest in any of this property covered by the seven policies we are speaking of in this case, the four of them that have been introduced in evidence, and the three of them that have been surrendered; you did nothing further about learning as to what portion of that property or any of those policies had [99] been transferred?

A. Unless there is a request to do it, I did not get into other people's business to find out what they are transferring or selling.

Q. But you said a moment ago you prepared some renewals covering the same property.

A. Only upon a statement of Mr. Rukgaber, a signed statement of values of what was left at the plant. It was submitted to the fire board for the average rate.

(Testimony of James D. Jenkin.)

Q. You are talking now about policies that were issued some time subsequent to the fire loss?

A. Yes.

Q. Not about these policies in question or about any endorsement on these policies?

A. These policies are issued here according to Mr. Rukgaber's statement of values at the time the policies are issued.

Q. Getting back to my question, I am not sure——

The Court: Is the jury as confused as I am about what is being talked about?

Q. I think you had better straighten this whole thing out, put it down one, two, three. I don't know what you are talking about. I hope the jury knows. Getting back to December 15th, 1950, Mr. Jenkin, you stated Mr. Rukgaber came in and at that time told you he was selling some property, some of the property covered by the policies involved in this lawsuit [100] issued by the seven defendant companies, is that right? A. Yes, he did.

Q. I asked you whether or not you had any conversation with Mr. Rukgaber between the 15th of December when you had this conversation we just referred to, any other conversation, or any other communication with him between the 15th of December, 1950, and the 2nd of January, 1951?

A. You asked me if I had a conversation. I said, "No," but I did write a letter asking for a new statement of values.

Q. That is all you did?

(Testimony of James D. Jenkin.)

A. That is all I did.

Q. You made a statement awhile ago that you did make some inquiry of Mr. Rukgaber the latter part of December of 1950 concerning the renewal of these policies.

A. Yes. I sent up a new form for him to set out his values.

Q. Then, did you do anything further about that after you sent out those forms?

A. He brought them in and I acknowledged his statement and sent it on to the Fire Board for re-issuance of new policies.

Q. When did Mr. Rukgaber bring those statements in, when are you talking about?

A. I don't know the exact date; some time in January.

Q. And you still insist that Mr. Rukgaber is wrong when he says that he, at any time requested you to make any endorsement on any of these policies indicating that he had sold a portion [101] of the property to Shulman.

A. No request was made to me to endorse the policies.

Q. At the time of the conversation on December 15th, 1950, did Mr. Rukgaber tell you that he contemplated making a sale of the property at some future time?

A. He told me he was selling the property. That was the words I got down; I think I copied as near as possible on my records that he was selling the

(Testimony of James D. Jenkin.)

property in the sawmill to the Alex Shulman Company.

Q. You made that notation?

A. I made that notation.

Q. Then you didn't do anything further about inquiring from him or making any endorsements, or finding out to whom he was selling, or what should be done about endorsing the policies to protect the interests of Darby Mills or the purchaser?

A. There was nothing ever requested of me, and I don't ask anybody about what they want done until they come into the office to ask for an endorsement.

Q. Mr. Jenkin, as part of your practice in selling insurance, you sell a service to your customers, don't you? A. We do.

Q. As part of that service you advise your customers the kind of insurance that should be carried, perhaps the amount they should carry, and what should be done by way of protecting their interests. That is all part of your service? [102]

A. Yes.

Q. Darby Mills had been your customer, according to your testimony here for a number of years prior to December 15th, 1950, when this conversation took place? A. Yes, I said that.

Q. Mr. Rukgaber came in and you admit he told you that he was selling some of the property covered by these insurance policies? A. Yes.

Q. And you at no time did anything subsequent to that, either at that time or subsequently, to find

(Testimony of James D. Jenkin.)

out from him who he was selling to, what he had sold, who the insurable interest was in, in whose name the insurance should be issued, what endorsement should be made. In other words, in this case, you didn't do anything about the result of that conversation?

A. A lot of property is sold. We don't go out and ask people how they want their policies endorsed. There is a lot of property sold without endorsement ever being put on the policy and the policy expires.

Q. You didn't ask Mr. Rukgaber whether he sold under a contract and he was to be protected under the contract or whether it was an out and out sale and how the purchaser was to be protected, you didn't say anything about that? A. No.

Q. Then, you weren't concerned about rendering any service [103] in this situation, knowing that the sale was being made, you weren't concerned about rendering any insurance service, either as a continuing service to your customer, Mr. Rukgaber, nor to the man who was buying, or the institution who was buying the property?

Mr. Boone: Objected to as argumentative.

The Court: Overruled.

A. As I said before, we don't inquire into what people are doing. If they want an endorsement on their policy, they will come in to our office and ask for it. Without we are required to, we don't ask if they want an endorsement put on their policy.

Q. Mr. Jenkin, isn't it a fact that in the course

(Testimony of James D. Jenkin.)

of conducting your business, if you learn of some individual that has bought some property from someone, whether it is new or old, it is part of your business to find out, and perhaps sell him some insurance if he hasn't any?

A. We go out to sell insurance, yes.

Q. In this case you had insurance on certain property. You knew that the property, or a portion of it, at least, was going to be sold, or had been sold, and yet you did nothing about either servicing the man you were representing who had coverage at the time, or the new purchaser, regardless of what his interest might be?

A. No, I didn't know when it was going to be sold or anything [104] about it. If it was sold and he wanted an endorsement, he would come in, which I would have to submit to the company on a change of a sawmill risk.

Q. Despite the fact he told you he sold the property or a portion of the property, you made no inquiry as to whom is was sold, or what remaining interest there was?

The Court: The witness didn't testify he had been told the property was sold.

Q. That he was selling the property.

The Court: Revise your question.

Q. Despite the fact Mr. Rukgaber told you that he was selling the property or a portion of it in the course of this conversation on December 15th, 1950, you made no inquiry from him as to the condition of sale, nor as to who the purchaser was, or who

(Testimony of James D. Jenkin.)

had the insurable interest for the purpose of protecting or making the policy provide for the protection normally to be needed in that situation?

Mr. Smith: Counsel has introduced "protection that would normally be needed."

The Court: Objection sustained.

Q. In summary, you made no inquiry and did nothing further about the information he gave you?

A. No.

Q. By that you mean you didn't?

A. I didn't make any inquiry. [105]

Q. After he had told you, after Mr. Rukgaber had told you he was selling this property or a portion of it, and you subsequently prepared renewals, did you make any inquiry of Mr. Rukgaber as to whom these policies should be issued, whether they could cover just the same amount of property, or just what the situation was going to be on these renewals?

A. I think I answered that in a question before, that I sent up a new blank form and a statement of values for Mr. Rukgaber to sign, stating what property they wanted to insure.

Q. Your request was simply as to a statement of values?

A. I covered a statement of values of the property to be insured, a blank form.

Q. You don't know when you sent that?

A. That was in December.

Q. Do you know whether he ever received it?

A. Yes, because he came back with a signed

(Testimony of James D. Jenkin.)

statement of values which was acknowledged and sent to the Fire Bureau for the average rate on the property they wanted to insure.

Q. Are you referring now to what you testified awhile ago that he came back some time the latter part of January and had these new policies issued on whatever property they had? A. Yes.

Q. You don't mean to say that had anything to do with property lost in the fire?

A. Nothing to do with property lost in this fire, because it [106] is not shown on the new policies.

Q. Mr. Jenkin, how did you first learn of the fire?

A. Mr. Rukgaber called me from Darby.

Q. When was that?

A. January 2nd, 1951.

Q. What did you tell Mr. Rukgaber on that occasion?

A. I told him I was sorry to learn he had a fire, that I would report the fire to the General Adjustment Bureau which handles all claims on fire insurance policies in our office.

Q. By that you mean the office here in Missoula?

A. The office here in Missoula.

Q. That is the office Mr. Harry Noel conducts?

A. Yes, the same office.

Q. Now, you referred to a conversation that occurred on January 14th, I believe. You stated that you took Mr. Rukgaber to Mr. Noel's office?

A. To Mr. Noel's office.

Q. And Mr. Jenkin, may I ask you this ques-

(Testimony of James D. Jenkin.)

tion: Have you been in the courtroom during the course of this trial? A. I have.

Q. You heard Mr. Rukgaber testify?

A. I did.

Q. And do you say now that Mr. Rukgaber at no time requested you to make any endorsements to cover the change in interest in any of the property that was involved in these policies? [107]

A. No request was ever made of me to endorse it.

Q. When, Mr. Jenkin, were you first notified that there was no coverage on this property so far as Darby Mills was concerned?

Mr. Smith: We object to that, your Honor. The evidence in the record shows there was coverage on this property so far as Darby Mills is concerned. The policies are in evidence; they were never cancelled. The question relates to a state of facts wholly without the record.

Mr. Korn: Either I don't understand counsel, or he doesn't understand me.

Mr. Smith: You said, "When were you notified there was no coverage on this property?" The property was covered so far as Darby Mills is concerned if they had any interest in it.

The Court: Yes, that is so. I will sustain the objection.

Q. Did you have any conversation, Mr. Jenkin, with Mr. Noel concerning this loss that occurred on some of this property covered by these seven policies in this case?

(Testimony of James D. Jenkin.)

A. I just reported it and went up there with Mr. Rukgaber, as I stated, on January 14th. That was as far as my conversation went with Mr. Noel, because when there is a claim turned over to the adjuster, I have nothing more to do with it. I don't discuss the claims with that office unless there is a delay or not a satisfactory adjustment being made. Then I ask him what he has done on it, and then I report it to the company for their [108] answer.

Q. Mr. Jenkin, did Mr. Shulman, the man who testified here in this case this morning, at any time communicate with you concerning this fire loss subsequent to January 2nd, 1951? A. No.

Q. You never had any conversation with Mr. Shulman at any time?

A. At any time subsequent to the loss, no.

Q. Do you deny Mr. Shulman called you on the telephone concerning this loss?

A. He called me on January 2nd saying there was a loss. I said, "If there is any loss on Darby Mills, it is being referred to the Adjustment Bureau," and I gave him the Adjustment Bureau's number.

Q. Did you tell him he wasn't covered by insurance?

A. I didn't say a word about any coverage.

Q. But you are positive that subsequent to the conversation of January 2nd, 1951, you had no further conversation with Mr. Shulman at any time concerning the matter of this loss, is that right?

A. That's right.

(Testimony of James D. Jenkin.)

Q. When Mr. Rukgaber came to your office on December 15th, 1950, and told you that he was selling this property, did you ask him for any instruments evidencing the sale? A. No.

The Court: You have covered that a half a dozen times, [109] counsel.

Mr. Korn: Not about instruments, your Honor.

The Court: He said he didn't have any conversation with him, didn't do anything. Isn't that what he said? He told him and that was all. He didn't do anything further about the matter, and that was all. All right, go ahead and ask the question. Let's get speeding up here. We are wasting too much time. We will be here trying this case for a week.

Mr. Korn: Read the question.

(Question read back by Reporter and also the answer.)

Mr. Korn: That is all.

Redirect Examination

By Mr. Smith:

Q. Mr. Jenkin, Mr. Korn has asked you with respect to endorsements on policies, and I will show you Plaintiffs' Exhibit 5, one of the exhibits anyway, and I will ask you if these papers which are clipped in here entitled "Endorsement" are what you have been referring to as endorsements?

A. These are what I have been referring to as endorsements.

Q. In the course of your coverage with Darby

(Testimony of James D. Jenkin.)

Mills, had you been frequently requested to make endorsements on the policies? A. I had.

Q. In every case where an endorsement had been requested, was the endorsement made and mailed to Darby Mills? [110] A. It was.

Q. When a policy of insurance is written, Mr. Jenkin, what do you do with respect to the notification of your companies?

A. Well, if there is a risk that we are not to take without referring to the companies, we immediately contact the company. After a policy is issued, one policy goes to the Fire Adjustment Bureau for their approval of the rate, and it is sent on to the company for their files.

Q. What happens with respect to endorsements?

A. The same procedure is followed with endorsements. The company gets one copy which goes to the Fire Rating Bureau to be cleared and sent on to the company.

Q. Mr. Korn brought out from questions that there are some kind of risks you can't take without prior approval. Is a sawmill that type of risk?

A. A sawmill is a more hazardous risk.

Q. When the applications were made in this case, were you required to make application to the companies to get their consent to take this risk?

A. I was. I had to refer to the companies to get to take the risk. I referred to about 12 companies before I got the desired number of policies.

Q. In that connection did Mr. Rukgaber know

(Testimony of James D. Jenkin.)

that you were making the request of the companies for the coverage?

A. Yes, he should have known because it was handled through [111] Garlington and Pauly's office at that time, where the original risk came from.

Q. Now, in connection with endorsement and changing a sawmill risk, is there any requirement that you request the consent of the company?

A. Before I can change the risk from one owner to the other, I have to take it up with the companies for their approval before I can issue any endorsements.

Q. Is that true with respect to sawmills?

A. Sawmill risks are more hazardous risks.

Q. Mr. Korn asked you generally with respect to practice on endorsements. What have you to say as to whether it is the practice of your company when requested to make an endorsement to make that endorsement immediately?

A. We make it immediately. If it is late in the afternoon, we make it the next day. It depends upon what time of day it is received. If it is received during business hours, we get the endorsement out during business hours, if possible. It takes precedence over anything else in the office.

Q. Is it the policy of your company to carry any risks for a period of as long as 15 or 17 days on oral promises of any kind?

A. No, everything must be valid, or must be in writing to be valid.

(Testimony of James D. Jenkin.)

Q. There has been some discussion about these renewal policies, [112] Mr. Jenkin, and I will ask you if these policies which are in evidence here expired on January 28th, 1951, is that correct?

A. Yes, that is correct.

Q. And at about that time were you interested in renewing some of these policies?

A. We were, and I sent up the blank form for values to be established and a jurat to be signed by the assured stating the values were correct which were to be referred to the Fire Board for rating.

Q. I call your attention to a sheet on Plaintiffs' Exhibit 5 which describes 12 items at Conner, Montant, did you see that? A. Yes.

Q. Are each of those 12 items items of specific property covered under this policy?

A. Yes, except one I think is eliminated by endorsement.

Q. When the renewal policies about which we have talked were issued, were some of the items shown on these policies dropped out?

A. Yes.

Q. Specifically, was the sawmill building?

A. The sawmill building and contents and blacksmith shop and contents.

Q. They were dropped out of the new policies?

A. Yes. [113]

Q. These renewal policies were issued some time after the loss, is that correct?

A. After the loss.

(Testimony of James D. Jenkin.)

Q. They were issued at the request of Mr. Rukgaber? A. That is correct.

Q. You indicated you had in your file a letter which was written to Mr. Rukgaber in December some time? A. Yes.

Q. Is that available in your office?

A. It is.

Q. And you also indicated at the time he was in, you made a note on your file with respect to the conversation. Is that note available? A. It is.

Q. Will you, at the next recess, get those over here, please? A. Yes.

Q. Now, Mr. Korn interrogated you with respect to your service to Darby Mills. Did you have any concern insofar as the coverage of Darby Mills themselves was concerned?

Mr. Korn: We object to that as calling for a conclusion of the witness and leading.

The Court: Sustained.

Mr. Smith: I am through with our redirect, your Honor, except I would like to put in evidence the letter which was referred to in cross-examination. [114]

The Court: You may recall him at a later time.

Recross-Examination

By Mr. Korn:

Q. With reference to what you have testified to here as obtaining permission or asking permission of your companies for covering certain risks, do I understand you that in this case you made no re-

(Testimony of James D. Jenkin.)

quest for the issuance of any coverage for the new risks involving the property in question under these policies after December 15th, 1950?

A. The policies were issued in the name of Darby Mills. After I have authority to insure Darby Mills, if there is a change of assured on the same property, I have to get permission from the companies to do so.

Q. As I understand then, Mr. Jenkin, in connection with the policies, the seven policies involved in this case and the property they cover, you at no time sought any authority from any of these companies so far as giving any coverage to the new purchaser was concerned?

A. I was never requested to do so.

Q. Now, you mean that you expected Mr. Rukgaber to request you to ask permission of your company, is that what you mean?

A. Permission for assignment of any policy of that nature, there had to be a request made to make it, which I put on an application form and request and sent it in to the company for [115] their approval.

Q. In other words, do I understand you correctly, before you make a request of any companies for permission to make that kind of endorsement or issue that kind of policy, you have to have a written request from the person who is interested in insurance?

A. They have to request me to have the policy assigned. I have to know all the particulars, and

(Testimony of James D. Jenkin.)

I submit it to the company for their approval, for a change in the risk of any kind.

Q. These policies, Mr. Jenkin, I suppose you have seen them many times. You are familiar with the expiration dates? A. Yes.

The Court: Let's not get into this. We have gone through the policies a dozen times. Let's start another line at this late date.

Mr. Korn: I was going to ask about premiums.

The Court: Was anything brought up on that on redirect? Limit it to the redirect. We are consuming too much time.

Mr. Korn: I don't know, I don't recall. I don't want to infringe on the Court's time. I thought the matter of the premiums on these particular policies was gone into. I want to ask if there had been any refund of the unexpired portion of the policy.

The Court: There doesn't seem to be any [116] issue.

Mr. Korn: It goes to the question of the conclusion of the witness, what his understanding was.

The Court: Let's go ahead, it will take less time to ask the question. Go ahead.

Q. Is it not a fact that at least three of these policies, Mr. Jenkin, had been renewed the preceding month, that is, in November, 1950?

A. Yes.

Q. And they were issued for a period of a year?

A. Correct.

Q. And at the time of this fire loss on January 2nd, there was a considerable portion of those three

(Testimony of James D. Jenkin.)

policies, so far as the premium is concerned that had not been earned, is that correct?

A. There was still premium earned on those policies of what remaining property was up there, and after a certain amount of loss, there is no reinstatement covering that property or any premium refunded.

Q. If there was no endorsement or transfer of any interest as of December 15th when this agreement of sale was made, if as of that date these policies ceased to cover any of the property because of this transfer of interest, then there would be an unearned premium for which a refund should be made to Darby Mills?

Mr. Smith: Objected to as improper recross-examination. [117]

The Court: Sustained.

Mr. Korn: That is all.

(10-minute recess.)

Redirect Examination

By Mr. Smith:

Q. Mr. Jenkin, I show you a document marked Defendants' Exhibit 13. I will ask you if that is a copy of a letter written by you to Darby Mills, Incorporated, on November 27, 1950? A. It is.

Q. Was the original of that letter deposited in the United States Mail with postage prepaid?

A. It was.

(Testimony of James D. Jenkin.)

Q. I will ask you if the letter of November 27th contains at the bottom some handwriting?

A. It does.

Q. Whose handwriting?

A. My handwriting.

Q. At what time, Mr. Jenkin, was that handwriting placed on that letter?

A. December 15th, 1950.

Q. That was at the time of your conversation with Mr. Rukgaber? A. It was. [118]

Q. Was it a notation put on there in his presence? A. It was.

Mr. Garlington: Will you offer simply the notation on the bottom?

Mr. Smith: We offer the whole letter, Mr. Garlington.

Mr. Garlington: The plaintiffs object to the typewitten portion of Defendants' Proposed Exhibit 13 for the reason the same is incompetent, irrelevant and immaterial and it is a self-serving declaration and is improper redirect examination.

Mr. Smith: The purpose of this offer, may it please the Court, is that during the cross-examination of the witness he was asked as to certain communications which had gone between him and Darby Mills. This is one of those communications.

Mr. Garlington: He wasn't interrogated about any communication prior to December 15th. I should like to add the additional objection that it is improper corroboration or attempted corroboration of the parties' witness.

(Testimony of James D. Jenkin.)

The Court: I don't see its relevancy, the typewritten part, and I will sustain the objection to the typewritten part of the exhibit. Is there any objection to the notation made on the 15th?

Mr. Garlington: No, your Honor, there is no objection to the notation.

The Court: Very well, cover the rest of the exhibit some way. [119]

Defendants Exhibit 13

"12/15/50 Alex Shulman Co. — Purchasing equipment under items 1-2-3.

"J."

Q. I call your attention to Defendants' Exhibit 14, Mr. Jenkin. I will ask you if that is a copy of a letter written by you to Darby Mills, Incorporated, on December 29th, 1950? A. It is.

Q. Was the original of that letter placed in the United States Mail? A. It was.

Q. Addressed to Darby Mills, Incorporated?

A. It was.

Q. And was postage prepaid? A. It was.

Mr. Smith: I now offer in evidence Defendants' Exhibit 14.

Mr. Garlington: To which the plaintiffs object for the reason that the same is incompetent, irrelevant and immaterial, improper redirect examination, and for the further reason that it is also a self-serving declaration apparently offered to corroborate the testimony of the witness.

The Court: It is produced as a result of inquiry

(Testimony of James D. Jenkin.)

on cross-examination, is it not? Wasn't reference made to this?

Mr. Smith: Yes. Counsel asked him whether there had been [120] any conversations and what had been done, and he said there had been this one transaction relative to the sending of these fire forms up, and it is produced in response to that.

Mr. Garlington: That doesn't make it relevant or material.

The Court: But that is what occasions its production. I'll overrule the objection. It may be admitted.

Defendants' Exhibit 14

"December 29, 1950.

"Darby Mills, Inc.
"Darby,
"Montana.

"Attention: J. Ward Rukgaber.

"Dear Ward:

"As you know, $20,000 insurance expires on January 28th, and in order to renew the same for the correct amount, it will be necessary to establish new values for the various buildings and file with the Montana Fire Rating Bureau a new Statement of Values for a new average rate.

"I have prepared a new form to be attached to the policies and have left the values blank so that you can complete. You can retain one copy and forward the other to me, also sign the enclosed Statement of Values in duplicate and I will complete it

(Testimony of James D. Jenkin.)

here for forwarding to the Rating Bureau. Upon receipt of this information, I will proceed so that the necessary information is on hand before the expiration of the present policies.

"Will the Alex Shulman Company have all the equipment moved by January 28th?

"Trust that you had a Merry Christmas and be careful New Years Eve, that's a bad night, and extending to you the best for the coming year, I am

"Sincerely yours,

"URTON CO.,

"J. G. JENKIN.

"dg"

Q. I call your attention now to Defendants' Exhibit 15, and I will ask you what that is.

A. That is an application for an average rate and a statement of value form prepared by the Pacific Fire Rating Bureau.

Q. There is a signature at the bottom, "Darby Mills, Inc., J. Ward Rukgaber," do you know whether that is Mr. Rukgaber's signature?

A. It is.

Q. I call your attention in the other corner to the place where a Notary would normally sign. I will ask you if this is a copy of another document?

A. This is a copy of the original document sent to the Montana Fire Rating Bureau establishing the average rate.

(Testimony of James D. Jenkin.)

Q. On the original document was your Notary signature attached? A. Yes.

Mr. Smith: We now offer in evidence Defendants' Exhibit 15.

Mr. Garlington: Same objection, your Honor. I can't see the sightest connection.

Mr. Smith: This is again relative to the whole matter [122] of the new insurance issued, and it is brought out simply to show what was done in response to the questions asked on cross-examination.

The Court: Objection overruled. It is admitted.

Defendants' Exhibit 15

"Pacific Fire Rating Bureau
Application for Average Rate and
Statement of Values

"These values are submitted for the purpose of establishing an average rate.

Insured: Darby Mills Incorporated.
Address:
City: Darby, Montana.
State:

Average Rates are requested for:
Property Damage
Fire [X]
E.C.E.
V.&M.M.
Quake
D.A.

(Testimony of James D. Jenkin.)

Business interruption
Fire
E.C.E.
V.&M.M.
Quake
D.A.

(List each separately-rated building or division.)

Description or Location	Building	Furniture-Fixtures-Machinery-Equipment	Stock
Connor, Montana (West Fork)			
1. Machine Shop (Frame)	$ 1,500.00		
2. Oil House (Frame)	100.00		
3. Bunkhouse (Frame-Brick Ch.)	1,000.00		
4. Bunkhouse (Same as No. 3)	300.00		
5. Bunkhouse (Same as No. 3)	300.00		
6. Cookhouse (Frame-S. P. Ch.)	2,000.00	$ 400.00	
7. Shed and Garage (Frame)	500.00		
8. Dwelling (Frame-Brick Ch.)	2,400.00		
9. Dwelling (Frame-S. P. Ch.)	1,200.00		
	$ 9,300.00	$ 400.00	

"State of Montana,
"County of Missoula—ss.

"J. Ward Rukgaber being first duly sworn upon oath says: [123]

"That he is the (identify official capacity of signer with respect to named insured, as owner, partner, officer) Treasurer of the Darby Mills, Inc., and that he makes this sworn statement for and on its behalf and that he is duly authorized so to do;

(Testimony of James D. Jenkin.)

that said concern desires to secure a rate for insurance on property located as designated above and that the above statement of values of said property is made for the purpose of securing such rate; that he has read the above statement and that said statement is true and correct as of January 20, 1951, to the best of his knowledge and belief.

"DARBY MILLS, INC.,

"J. WARD RUKGABER,
"Treasurer.

"Subscribed and sworn to before me this 20th day of January, 1951.

"Notary Public in and for the State of Montana, residing at Missoula, Montana.

"(Seal)"

Mr. Smith: That is all.

(Witness excused.) [124]

(Thereafter, at the close of all of the evidence, the following motions were made by defendants:)

MOTION FOR DIRECTED VERDICT

Mr. Smith: At this time, may it please the Court, the defendants and each of them move that a verdict in favor of the defendants be directed as against the plaintiff Darby Mills on the grounds and for the reasons stated in our motion for non-

suit made at the close of the Plaintiffs' case; and the defendants and each of them move that a verdict be directed entered for the defendants and against plaintiff Alex Shulman on all of the grounds stated in the motion for non-suit, which we made at the close of plaintiffs' evidence, and on the additional ground that it now appears in the evidence without dispute that the agent Urton and Company and Jenkin had no power to enter sawmill risks or make endorsements of a policy covering sawmill risks without specific authority of the companies involved; and may it be understood that this motion is based upon the grounds previously stated without the necessity of reiterating those grounds.

Mr. Garlington: It may be so stipulated.

The Court: I will reserve the ruling.

(Thereafter, in his charge to the jury, the Court granted the motion for directed verdict as against the plaintiff Darby Mills and denied the motions for non-suit and directed verdict against the plaintiff Alex Shulman.) [124(a)]

In The United States District Court, District of Montana, Missoula Division

State of Montana,
County of Silver Bow—ss.

I, John J. Parker, certify that I am the Official Court Reporter of the above entitled Court; that I reported the trial of the cause of Darby Mills, Inc., et al., vs. Atlas Assurance Co., Ltd., et al., being cause No. 566 in the above Court, tried before the Hon. W.

D. Murray, sitting with a Jury at Missoula, Montana, commencing on the 24th day of March, 1952; that the foregoing is a partial transcript of the proceedings had at said trial, and insofar as said transcript covers the proceedings had at said trial, it is a true and correct transcript.

Dated at Butte, Montana, this 1st day of August, 1952.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed August 13, 1952.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals in Case No. 566, Darby Mills, Inc., et al., Plaintiffs vs. Atlas Assurance Company, Ltd., et al., Defendants, and designated by the Appellant as the record on appeal in said cause, and that the Complaint, Answer, Interrogatories submitted to the jury, the Verdict and the Judgment are contained in the Judgment Roll.

I further certify that defendants' motion for Non-suit and defendants' motion for directed verdict, items 5 and 6 of the designation, were orally

made, and a copy of the minute entry thereof is transmitted herewith.

I further certify that I transmit herewith as a part of the record on appeal, the Reporter's Partial Transcript of Testimony filed August 13, 1952.

Witness my hand and the seal of said Court at Helena, Montana, this 9th day of September, A.D. 1952.

[Seal] /s/ H. H. WALKER,
Clerk as aforesaid.

[Endorsed]: No. 13538. United States Court of Appeals for the Ninth Circuit. Atlas Assurance Company, Ltd., a Corporation, Aetna Insurance Company, a Corporation, The Home Insurance Company, a Corporation, Providence Washington Insurance Company, a Corporation, National Union Fire Insurance Company, a Corporation, and Niagara Fire Insurance Company, a Corporation, Appellants, vs. Darby Mills, Inc., a Corporation and Alex Shulman, Doing Business as Alex Shulman Co., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed September 12, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13538

DARBY MILLS, INC., a Corporation, and ALEX SHULMAN, Doing Business as ALEX SHULMAN CO.,

Appellees,

vs.

ATLAS ASSURANCE COMPANY, LTD., a Corporation, AETNA INSURANCE COMPANY, a Corporation, NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation, THE HOME INSURANCE COMPANY, a Corporation, PROVIDENCE WASHINGTON INSURANCE COMPANY, a Corporation, NATIONAL UNION FIRE INSURANCE COMPANY, a Corporation, and NIAGARA FIRE INSURANCE COMPANY, a Corporation,

Appellants.

STATEMENT OF POINTS.

Pursuant to Rule 19 (6) of the Rules of the above entitled Court, appellants state the points upon which they will rely on appeal are as follows:

1. The District Court erred in refusing to direct a verdict in favor of the appellants, and against the appellee, Alex Shulman, doing business as Alex Shulman Company, at the close of the appellee's case.

2. The District Court erred in refusing to direct a verdict in favor of the appellants, and against the

appellee, Alex Shulman, doing business as Alex Shulman Co., at the close of all of the evidence.

3. The District Court erred in refusing to direct a judgment for the appellants notwithstanding the verdict.

In connection with these points the appellants intend to rely upon the proposition that as a matter of law no valid judgment could be entered against the appellants because the insurance policies specifically provide that there could be no assignment of them without the written consent of the appellant companies, and that there was no such consent; that the policies specifically provide that no agent has the power to waive any provisions of the policies unless the waiver be given in writing, and that there was no such written waiver; that the evidence shows that the agent in this case had no power to make any assignment of any interest in the fire policies in question without the express consent of the appellants, and that no such express consent was given; that the evidence fails to show that any interest in the insurance policies in question was assigned to the appellee, Alex Shulman, by the plaintiff, Darby Mills.

Dated this 12th day of September, 1952.

/s/ RUSSELL E. SMITH,
/s/ W. T. BOONE,
/s/ JACK W. RIMEL,
Attorneys for Defendant-Appellants.

[Endorsed]: Filed September 15, 1952.